Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

FRIENDS OF FALUN GONG, *et al.*,

Petitioners,

v.

PACIFIC CULTURE ENTERPRISE, INC., d/b/a The China Press; SING TAO NEWSPAPERS NEW YORK, LTD., d/b/a Sing Tao Daily; and DAVID MUI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether intentional and defamatory falsehoods against a group systematically published by a foreign press in the United States would subject the publishers to potential liability for defamation or whether they are "group defamation" protected under the broad interpretation of the First Amendment.

Whether Circuit Court should have applied the "intensity of suspicion test" established by a controlling state intermediate court to decide if the defamatory falsehoods refer to members of a group, and whether Circuit Court's failure to apply such controlling test amounts to a violation of the Due Process Clause under the Constitution.

LIST OF PARTIES

In addition to Friends of Falun Gong, the following persons are also Petitioners: Feng Yuan; Li Li; Janet Xiong; Hanru Zhu; Mela Wu-Malin; Wailing Lam; Xuemei Feng; Yan Liu; Mei Hong; Jianfen Zhou; Ke Li; Zhenmei Xu; Fengching Chang; Qi Zhang; Meimiao Lee; Lianhua Ziu; Shuling Chen; Chaofeng Chang; Derong Zhang; Wei Wu; Quen Sha; Xiuzhi Jiang; Kun Cai; Chunmei Tsoi; Ming Zhai; Tianheng Song; Zhangguo Shi; Fangfang Jiang; Lisa Kei; Chin Ping Cheng; Connie Pan; Yang Li; Wanling Chung; Fungfei Tong; Lankiu Chang; Lai Kwan Lum; Lin Wang; Jianmin Huang; Hong Zhao; Yanqin Xia; Jiaying Jiang; Haiwen Yu; Shihfung Chu; Sheue Dih Wong; Eva T. Xu; Siu Ha Tam; See Chim Lee; Rong Yi; Tze Yuen Chan; Chang Gao; Hui Ling Ko; William Chan; Allan Wu; Yunqin Li; Shi Yin Cheung; Yan Zuo; Xu Kangang; Lorraine Kabacinski; Betty Hunter Beatty; Suzanne Eckler; Hong Xia Jia; Xin Zhao; Sewmeng Lee; Fatping Cheung; Dongmei Li; James Smith; Lan Sing Cheng; Yahong Bai; Ruiqing Li; and Shuhuan Qu.

Defendants, Fan Dongsheng; Lu Zidai; Li Daye; Shan Huaihai; and Yang Huifen, were dropped during the Second Circuit appeal, and are no longer parties to this case.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner Friends of Falun Gong states that it is a not-for-profit organization and does not issue stock.

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Appendix B — Memorandum And Order Of The United States District Court For The Eastern District Of New York Dated September 24, 2003 ..... 8a

OPINIONS BELOW

The district court's opinion (per Amon, D.J.) granting respondents' motion to dismiss is published at 288 F. Supp. 2d 273. The court of appeals signed and entered a summary order affirming the district court's decision on August 9, 2004. The summary order from the court of appeals is not published. *See* Appendices A & B.

STATEMENT OF JURISDICTION

The court of appeals entered its summary order on August 9, 2004. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The Fifth Amendment to the United States Constitution provides, in part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

The Fourteenth Amendment to the United States Constitution provides, in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens

of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. Falun Gong is a self-improvement practice consisting of five sets of exercises similar to tai-chi or yoga, the fifth set of which is a sitting meditation. The practice also explains the correlation of a person's state of mind and physical health or well-being. In addition to practicing the exercises, individuals who practice Falun Gong seek to improve themselves according to the fundamental values of "Truthfulness, Compassion and Tolerance." *See* C.A. App. A-141 Para. 11. Falun Gong originated in China and was passed down for at least hundreds of years. It was first introduced to the public in 1992, gaining immediate popularity. *Id.* By 1999, statistics show that more than 100 million people in China were practicing Falun Gong, a number surpassing the number of members in the Chinese Communist Party. However, in 1999, the former president of China, Mr. Jiang Zemin, declared Falun Gong to be the "number one enemy of the state," personally ordered the elimination of Falun Gong and mobilized the machinery of the nation (the "Jiang Regime") to carry out the persecution. *See id.* A-26, A-38.

2. Falun Gong was first introduced to New York in or about 1996 and has since received numerous state, city and municipal awards, proclaiming its contributions to local society and recognizing the practitioners' courage and perseverance in the face of extraordinary persecution. C.A. App. A-141 Para. 12. Falun Gong is legal, recognized,

and practiced in more than 60 countries worldwide. From the executive to the legislative branches, the United States has officially condemned the persecution of Falun Gong started by the Jiang Regime. *See id* A-143 Para. 18.[1] The brutal torture and killing of Falun Gong practitioners continue today. Not limited by the border of nations, the Jiang Regime further extends its interference into the United States. Within the United States, particularly in New York, the Jiang Regime carries out its goals of the persecution largely through its control of the Chinese media.

3. The China Press, a newspaper published by respondent Pacific Culture Enterprise, Inc., is a Chinese newspaper in New York directly controlled by China.[2] The China Press "represents the voice and views of China's

1. "The US House of Representatives unanimously passed concurrent resolution H. Con. Res. 218 on Nov. 18 and the US Senate passed concurrent resolution S. Con. Res. 218 on Nov. 19, to urge China to stop its persecution of Falun Gong." Most recently, on October 4, 2004, the US House of Representatives unanimously passed Resolution 304 "Urging the Chinese Government to Cease Its Oppression of Falun Gong Practitioners in the United States and China." The resolution requested the United States President to issue an official public demarche, a formal protest, to China for its repeated violation of the fundamental human rights, the Attorney General to investigate reports that Chinese consular officials in the US have illegally interfered with Falun Gong practitioners and to take appropriate legal course of action, among others.

2. The reference to "China" in this case refers to the China controlled by the Jiang Regime. No allegations are made against the new regime in China headed by Mr. Hu Jintao, but since the Jiang Regime still overshadows Mr. Hu and the articles in question were published when Mr. Jiang Zemin was the president, the head of the communist party and/or the head of the military, the reference to China remains herein.

Communist government". *Id.* A-402. It carries many of the same articles from Xinhua News Agency, the state-run news distributor of China. *Id.* A-409.[3] The China Press is in charge of a continuous campaign to destroy the reputation of Falun Gong practitioners in New York. *Id.* A-383. Para. 10.[4] It published more than 300 articles over three years since the persecution started, an average of one article on Falun Gong in every three days. *Id.* A-159. These articles claim expressly or implicitly that the Falun Gong practitioners are "murderers," "criminals," "immolators," "people with mental illness" and others. *Id.* A-158 to A-360. Many reports conclusively link felonious crimes or unfortunate occurrences with Falun Gong. *Id.* Several articles mention that Falun Gong "caused 1700 deaths." *Id.* A number of the articles called for violent actions against Falun Gong. *Id.* Numerous articles consisted of "facts" provided by China. *Id.* All the "homicides", "immolations", other crimes and illegal actions supporting the conclusions in the reports occur in China and not anywhere else in the world.

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3. From the record below, one article published by Xinhua News Agency provides a glimpse of China's control of The China Press and how China achieves its control of the media through a media certification process. In "Publishing Industry Adopts Job Certification", The China Press issued a joint document with Public Administrations [of China], the Chinese Communist Party Central Committee Propaganda Department, the State Education Commission [of China] and the Ministry of Personnel [of China] to announce the training of presidents and chief editors of publishing houses, chief editors of periodicals, plant directors of designated publishing houses and audio-video copying enterprises, and managers of Xinhua bookstores at the provincial, prefectural and county levels.

4. According to a sworn affidavit in the record made by a former employee of a state-controlled Chinese media, The China Press has no fear in publishing the deliberately falsified materials against Falun Gong or break any laws in the United States because it has the Chinese Communist government as its support. C.A. App A-383.

The China Press' articles on Falun Gong can be categorized into the following general types: (1) inciting reports on the anti-Falun Gong activities held by the Chinese consulate(s) and/or pro-communist organizations in New York or elsewhere, (2) degrading/discrediting reports on Falun Gong's activities in New York (3) republication of articles written by the state-run media of China (i.e. self-immolation, self-mutilation, murders) (4) articles filled with false or unverifiable facts purporting to support the deduction or conclusion reached in the articles. Some of the headlines of the articles published by The China Press are:

"Evil Launched Mass Suicide Again" (*Id.* A-160, A-220)

"Evil Cult Must Not Be Treated Softheartedly" (*Id.* A-161, A-231)

"Attack Evil Cult, Safeguard Human Rights" (*Id.* A-161, A-235)

"Another Death Case By Evil Cult 'Falun Gong' Was Exposed" (*Id.* A-161, A-256)

"Evil Cult Strikes Again, A Beijing Falun Gong Member Kills Father And Wife" (*Id.* A-161, A-266)

"A Beijing 'Falun Gong' Fanatic Goes Mad Kills Father And Wife And Wounds Mother" (published over three days in cross sections) (*Id.* A-161, A-280)

"Another Hard Evidence for Falun Gong Who Only Wishes Disorder" (*Id.* A-161, A-310)

"Strike Hard On Falun Gong" (*Id.* A-162, A-324)

4. Global China Technology Group Ltd., the parent company of respondent Singtao Newspapers New York Ltd. ("STN"), is a partner of Xinhua News Agency and runs Xinhua Online, the electronic publication of Xinhua News Agency. *Id.* A-403. In fact, many of the fabricated news articles were first published on Xinhua Online, or China News Net, and then republished in The China Press. *See id.* A-279 to A-284. STN publishes the newspaper Sing Tao Daily ("STD"). STD is widely distributed in New York. *Id.* A-144 Para. 24.

On September 20, 2001, days after the 9-11 World Trade Center terrorist attack, STD published a full-page article titled "Radical Religions Advocate Destroying the World." *Id.* A-98 to A-101, A-366 to 367. The article mentioned Falun Gong in two places and included one color photograph of Falun Gong practitioners meditating. *Id.* Above the photo, the statement claims that Falun Gong:

> lead[s] people to superstition, delude people into setting themselves alight, and self-mutilation in order to achieve the "consummation" to ascend to heaven.

Id.

In part, the second statement in the article mentions:

> . . . Falun Gong has caused more than 1700 deaths in Mainland China, either from delay of medical treatments or suicidal acts, even self-mutilations, because it is anti-science and anti-society. In January this year on Tiananmen Square, five Falun Gong followers posted [sic] a qigong stance,

> shouted "Falun Dafa is good", then set fire to themselves in an attempted group suicide, which left one dead, four injured. The four injured lost the outward form of a man as a result of burns. CNN TV at the scene filmed the entire course of the incident.[5]

Id.

5. The petitioners brought the original action for defamation in the Supreme Court for the State of New York of Queens County against the respondents Pacific Culture Enterprise, Inc., d/b/a The China Press, and STN to seek redress for their injuries suffered. The petitioners also sought to enjoin the respondents from publishing similar defamatory materials, thus causing further damages. *Id.* A-139.[6] Included

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5. STD's statement about CNN filming the entire event in the article was made after CNN has publicly denied that it had filmed the incident.

6. *See also* Affidavit of Quanbao Wei (C.A. App. A-374 to A-376) (a reader of The China Press and non-practitioner expressed how the articles create a bad image of practitioners in New York; after reading the articles, readers would naturally believe that those who practice Falun Gong are "fanatic(s)" and would "go insane"); Affidavit of Zhang Derong (C.A. App. A-24 to A-25) (after exclaiming that The China Press said Falun Gong is not good and how much they believed the newspaper, several Chinese men yelled and cursed at affiant, and later tried to push and grab her camera; police had to be called); Affidavit of Feng Xuemei (C.A. App. A-26 to 28) (after reading reports about Falun Gong's "homicide" and "self-immolation" in newspapers, two potential employers refused to hire affiant when they discovered that affiant practices Falun Gong); Affidavit of Zhu Lianhua (C.A. App. A-31 to A-32) (people working

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as defendants in the original action are the writers for The China Press: Li Daye, Lu Zidai, and Shan Huaihai. Also included as defendants are the writers/editors for STD: David Mui and Yang Huifen. Petitioners filed an amended complaint shortly after the state court denied the petitioners' request for an order temporarily restraining the defendants from publishing defamatory materials against Falun Gong. The amended complaint added the causes of action for conspiracy to violate civil rights under 42 U.S.C. § 1985(3) and for a civil rights violation under New York State Civil Rights Law

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(Cont'd)

with non-practitioner husband said "better tell [your wife] to stop [practicing Falun Gong], or she will hang herself, or burn herself with gas"; husband beat affiant violently when she refused to stop practicing Falun Gong and police had to be called); Affidavit of Lee Meimiao (C.A. App. A-33 to A-34) (restaurant owner suffering loss of business when frequent customers expressed negative views about her practice of Falun Gong after customers read articles published in the newspapers; many subsequently stopped visiting her restaurant); Affidavit of Chen Zhuli (C.A. App. A-370 to A-371) (artist rejected by community association after the publication of The China Press articles; association expressing the fear that she might become "insane" and "suicidal", therefore bringing disgrace and harm to the association); Affidavit of Lam Wai Ling (C.A. App. A-372 to A-373) (while surrounding and pushing affiant, mob shouted words from headlines and articles of The China Press: "Strike Hard on Falun Gong", "Falun Gong is an evil cult", "drive away evil cult"); Affidavit of Chui-Ping Cheng (C.A. App. A-384 to A-386) (after reading the articles by The China Press "Beijing 'Falun Gong' fanatic goes mad kills father and wife and wounds mother", husband kicked affiant from bed when she refused to give up her practice of Falun Gong); Affidavit of Yan Liu (C.A. App. A-387 to A-390) (after reading the articles in The China Press and STD and knowing affiant biologist practiced Falun Gong, colleagues of biologist expressed that they were upset with Falun Gong and those who practiced Falun Gong, resulting in biologist's emotional and reputational injuries).

§ 40-c. Before the preliminary injunction hearing could be heard in the state court, the defendants removed the case to the District Court for the Eastern District of New York on the basis of federal question jurisdiction over the additional federal statutory conspiracy claim. The district court granted the motions to dismiss from the China Press and STN defendants, and the petitioners appealed the decision of the district court to the United States Court of Appeals for the Second Circuit. *See* Appendix A-B. In a summary order, the court of appeals affirmed the decision of the district court. Appendix B.

REASONS FOR GRANTING THE PETITION

I. The Issue Presented Is Of VITAL Importance And Of Immediate Practical Significance

"[T]he poisonous atmosphere of the easy lie can infect and degrade a whole society." *Rosenblatt v. Baer*, 383 U.S. 75, 94 (1966) (Stewart, J., concurring).

Media used in a free world are invaluable tools of knowledge. The First Amendment of the United States Constitution guarantees freedom of speech and freedom of press. This Court has frequently made reference to the notion of the "marketplace of ideas." *See generally McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *F. C. C. v. Pacifica Foundation*, 438 U.S. 726 (1978). With the convenience of modern technology, ease of transportation, and the fact that the nations of the free world and the non-democratic states are more interconnected by economy and other common interests, information travels speedily across borders, all except for information subject to the control of a dictatorship.

In the modern world, the elimination of a dictator's chosen "enemy" takes on a new and unprecedented scope. Media, for him, become the major weapons of poison and destruction. In a dictatorship, media control is necessary to prevent free flow of information that could likely obstruct or expose any plans he has that is against the public will or opinion. If controlled well, media are a deadly double-edged sword. Effective media control by a dictatorship also allows the world to hear or receive information that the dictatorship chooses for the public to hear, allowing for further reinforcement of the dictatorship. Media, thus, become a tremendously powerful tool for a dictatorship to achieve its self-serving end.

In this case, the Jiang Regime controls the respondent newspapers. Falun Gong is Jiang Zemin's chosen "enemy". In addition to publishing falsified articles directly in the newspapers it controls, the Jiang Regime also intentionally feeds the mainstream media in the international community with fabricated information on "Falun Gong." This would allow the regime to minimize any unwelcome third party investigation into the regime's handling of Falun Gong and to minimize any possible support of Falun Gong. Because of its absolute control of information and media inside China, its story on Falun Gong is an easy lie. The poison spreads to an unwary, free country: the United States.[7]

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7. From Hitler's genocide of the Jews to Stalin's elimination of the churches, history has taught us about dictatorships, how they pick their "enemies", often innocent of the crimes the "enemies" are accused of, and how these dictators used their power secured through often surreptitious means to eliminate the "enemies," at all cost to humankind. The extent they would go to and resources devoted to achieve such elimination are enormous. However, with the demand to know the truth and the courage to take responsibility by the humankind while a wide-scale extermination is occurring, many of the atrocities could have been prevented, or, at least, addressed while they are happening.

As it now stands in the United States, group libel law is in a state of disarray and confusion. While claiming protections from the First Amendment, the press run by a dictatorship is not meant to be a democratic forum to exchange or explore ideas, but is used to promote a state agenda by convincing an unknowing populace, even if it means staging facts and fabricating news. These media are not supporters of the marketplace of ideas. They are toxins in the exchange, molesting the press freedom and assailing the community welfare. Because of their unique positions and ties with a powerful dictatorship, they tend to monopolize the marketplace on issues such as Falun Gong.

It is, thus, vitally crucial, and very urgent, for this Court to provide a guidance on whether systematic and intentional lies published against a group by a foreign press in the United States should be subject to the potential liability for defamation in this nation or if the publication of these materials falls under the exceptions of defamation liability under the First Amendment.

II. This Court Has Never Acknowledged The Validity Or Need For A Broad Constitution-Based "Group Defamation" Exception To Liability For Defamation; Such A Requirement Would Unjustifiably Protect Defamers Without Any Correlating Societal Benefit

A broad constitutionally-based "group defamation" exception to liability for defamation will not materially advance any interest protected by the First Amendment but will have a serious devastating effect on the ability of individuals to redress reputational injury caused by the publication of defamatory falsehoods. Defamatory false statements of facts are not protected by the Constitution.

> "[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues. They belong to that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'"

Philadelphia Newspapers, Inc., et al. v. Maurice S. Hepps, 475 U.S. 767, 785 (1986), citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974), citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) and *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

Reasoning that "uninhibited, robust and wide-open" debates on public issues need to be protected, this Court established that the First Amendment, incorporated by the Fourteenth, validly imposes Constitutional limits on a State's common law of defamation. *New York Times v. Sullivan*, 376 U.S. at 277-279. Liability for defamation was perceived as imposing enough burdens on the press to induce media self-censorship. *Id.* Subsequent to *New York Times v. Sullivan*, this Court established additional Constitutional rules to defamation law, fine-tuning on private figure plaintiffs. *Gertz*, 418 U.S. 323 (a private individual plaintiff must show some level of "fault" to recover any damages, and the level of fault rises to "actual malice" if the plaintiff seeks to recover presumed or punitive damages); *Hepps*, 475 U.S. 767 (a private figure plaintiff is required to prove "falsity" of media defendant's publication on matter of public concern). In applications to private figure plaintiffs, the "fault-falsity" requirements established by this Court in *Gertz-Hepps* make

it unnecessary for this Court to further create a group exception in defamation actions. The mere fact that the entity being defamed is a group should not mechanically disqualify the members of the group who suffered injuries from seeking redress.

The Constitutional limits developed since *New York Times v. Sullivan* increased the victims paying the grand premium of defamatory falsehoods to its justifiable maximum. Insomuch as prior to *New York Times v. Sullivan*, the strict liability nature of defamation law threatened to chill the media from publishing the truth regarding matters of public concern, the current state of group defamation law has moved to the other extreme and threatens to wipe out any safeguards against publishing intentional false information against a group, forcing private individuals as members of the group into completely defenseless positions. Those with real and crippled reputations cannot seek redress in cases against the press, due to the arbitrary, mechanical, and undifferentiated application of the "of and concerning" requirement in a group context. The development of group defamation law has gradually taken away any hope for recovery by a private figure plaintiff, suffering deeply from a defamatory falsehood against the group from which the individual belongs. Adoption of a broad "group defamation" exception to defamation actions could literally destroy the defamation law as it applies to groups if statements laden with factual content and plainly intended and reasonably understood as assertions of fact are given absolute protection under the Constitution.

III. The Circuits Are Uncertain Over The Constitutional Standard To Apply In Group Defamation Cases

A. The Circuits Are Generally Uncertain Whether The Common Law "Of And Concerning" Requirement Is A Constitutional Norm, Which This Court Alone Can Resolve

The Circuit Courts have, in general, refused to allow an individual action for group defamation unless an individual can show that the defamatory material is referring to the individual. The often-used "of and concerning" phrase has been used as a shorthand for the common law rule that "a plaintiff in a defamation case must show that the statement referred to the plaintiff, either explicitly or by implication." *Emerito Estrada Rivera-Isuzu De P.R., Inc. v. Consumers Union of United States, Inc.*, 233 F.3d 24, 26 (1st Cir. 2000). In general, to satisfy the rule, one of two tests is employed. The first type is a size-oriented test. When applying the size-oriented test, if the size of the group is beyond a certain number, the bar against recovery is practically absolute, save other unusual circumstances that would warrant an exception. *See also* discussion *infra* Section III.B. The second test is the "intensity of suspicion test." This test discards the narrow focus on the size of the group and focuses more on the circumstances of the situation. *See Fawcett Publications, Inc. v. Morris*, 377 P.2d 42 (Okla. 1962), *cert. denied*, 376 U.S. 513 (1964); *Brady v. Ottaway Newspapers, Inc.*, 445 N.Y.S.2d 786 (1981).

It is unclear if the "of and concerning" test was constitutionally required. In *New York Times v. Sullivan*, this Court stated that "the evidence was constitutionally defective . . . incapable of supporting the jury's finding that the

allegedly libelous statements were made "of and concerning" [the plaintiff]." 376 U.S. at 288. Subsequently, in *Rosenblatt*, this Court found that when jury instructions permitted finding liability merely on the basis of a plaintiff's relationship to the government agency, the management of which was being questioned, it was constitutionally insufficient to indiscriminately find that members of the group could be suspected for being responsible of the conduct of the criticized government since it was tantamount to a demand for recovery based on libel of government. 383 U.S. at 82-83. However, both *New York Times v. Sullivan* and *Rosenblatt* were concerned with libel against governmental activities. At least one Circuit Court has refused to adopt the broad view which generalizes that the "of and concerning" requirement was constitutionally required to protect the press. *Emerito*, 233 F.3d 24 (refusing to accept the broad view concerning the Constitutional protection expressed in the ruling from a California court and in the treatise, Sack & Baron, Libel, Slander, and Related Problems §§ 11.1.4.3, 11.1.8 (2d ed. 1994)). It is not apparent that this Court established in these two cases the "of and concerning" requirement under the Constitution. Only this Court can provide the necessary guidance in this area and resolve this issue.

B. The Circuits Are Uncertain Over The Application Of The "Of And Concerning" Requirement

(1) The Decisions Reflect A Widespread Uncertainty Over Using Arbitrary Group Size As The Determinant Factor

Some Circuit Courts have denied member plaintiff's recovery against the defendants predominantly because of group size. *Schuster v. U.S. News & World Report, Inc.*, 602 F.2d 850 (8th Cir. 1979); *Michigan United Conservation Clubs v. CBS News*, 665 F.2d 110 (6th Cir. 1981). The cases in which recovery has been allowed usually have involved numbers of 25 or fewer. RESTATEMENT (SECOND) OF TORTS § 564A cmt. b (1977). For lack of justification in denying redress based on arbitrary numbers, several courts have refused to consider group size as the determinant factor when deciding whether a plaintiff can recover.[8] *Alvord-Polk, Inc. v. F. Schumacher & Co.* 37 F.3d 996 (3d Cir. 1994), *cert. denied sub nom., F. Schumacher & Co. v. Alvord-Polk, Inc.*, 514 U.S. 1063 (1995) (using the size of a group to decide the viability of an individual action is "amorphous and ill-defined."); *Fawcett*, 377 P.2d 42 (there is no "substantial reason why size alone should be conclusive").

One rationale given for using size as a determinant factor in deciding whether an individual plaintiff can recover in a group defamation is that the larger the group the less likely the recipient of the communication will understand the defamatory communication to be referring to a particular member. *See* SACK

8. "[T]he finding of the exact place at which to draw the line between a group small enough to allow individual recovery, and one too large to allow individual recovery, has troubled the courts since the early development of the law concerning group defamation." Note, *Libel and Slander—Defamation of a Group—Civil and Criminal Liability*, 33 OR. L. REV. 68, 69 (1953).

ON DEFAMATION: LIBEL, SLANDER & RELATED PROBS. § 2.9.4. The psychological assumption underlying this rationale lends serious doubts, however. It assumes that the reasonable readers are rational or that readers have adequate information from alternative sources to treat the statements rationally. Yet, the reality is reasonable readers most likely cannot treat the statements rationally when there exists compelling external reasons. In these situations, the defamatory articles may then effectively create the prejudices in the readers' minds. Any defamatory materials published subsequently may further reinforce the prejudices. This reality can occur irrespective of the size of the group. *See Brady*, 445 N.Y.S.2d 786, 788, citing *Group Vilification Reconsidered*, 89 YALE L.J. 308, 311-313.

Another rationale stated for limiting a member's redress in a group defamation is the need to reduce the threat of increased litigation or to avoid opening a floodgate of lawsuits. This reasoning is likewise unpersuasive since it implies group defamation cases are without merits. It focuses narrowly on the fear of increased litigation and loses sight of the larger societal consequences that need to be addressed and balanced. It also does not take into account the fundamental functions and role of the courts. The courts are established to resolve disputes and to provide redress for injuries suffered by those who bring the merits of their cases before the courts. For real injuries that have been suffered, redress is needed and well-principled precedents are necessary to reduce severe social harm. The courts need to provide "socially relevant and rational remedies," which would replace "ideological extremes in which speech is either sanctified or nullified dogmatically."[9] Hence, group defamation cases should not be treated differently from other types of cases.

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9. Leon E. Trakman, *Transforming Free Speech: Rights and Responsibilities*, 56 OHIO ST. L.J. 899, 932 (1995).

Using an arbitrary size to determine whether recovery is allowed or not in a group defamation would encourage defamation against a group above a certain size. This unnecessary loophole in the law allows detrimental consequences to occur. A media controlled by a dictatorship can effectively attribute homicides and fabricate realistic-sounding lies against its targeted group that is larger than a certain size, without being held accountable for any harm to the members of the group, even if the harm was calculated and systematically executed. This trample upon the freedom of press through the poisonous spread of intentional falsifications by the foreign press controlled by a dictatorship should be examined and absolutely forbidden.

(2) The Decisions Reflect A General Uncertainty Over The Application Of The "Other Circumstances" Test

The Third Circuit looked beyond the mere size of the group and found that a statement is "of and concerning" a plaintiff if, by description or circumstances, it tends to identify the plaintiff as its object. *Redco Corp. v. CBS, Inc.*, 758 F.2d 970 (3d Cir. 1985), *cert. denied*, 474 U.S. 843 (1985). In New York, a district court held that a publication referring only to a group may be actionable by individual members of that group if it "was reasonably understood [to refer to the plaintiffs] by many of those who read" the publication. *Atlantis Int'l, Ltd. v. Houbigant, Inc.*, 1996 WL 527334, at *5 (S.D.N.Y., Sept. 16, 1996).

When an action involves individual defamation, the Second Circuit held that it is not necessary to prove that the defendant intended his statement to refer to the plaintiff, but that it is enough that the audience could perceive the plaintiff to be implicated by the content of the statement or even by

extrinsic facts. *Geisler v. Petrocelli*, 616 F.2d 636 (2d Cir. 1980). *See also Ruzicka v. Conde Nast Publications, Inc.*, 999 F.2d 1319, 1322 (8th Cir. 1993) (the plaintiff need not be cited by name for the statement to be "of and concerning the plaintiff"; the test is the reasonable understanding of the recipient of the communication); *Golden North Airways, Inc. v. Tanana Publishing Company*, 218 F.2d 612, 621 (9th Cir. 1954) (there is no requirement that the person defamed be mentioned by name; it is sufficient if the publication points to the plaintiff by description or circumstances tend to identify him). One commentator suggested that the court should consider the "nature of the statement, the circumstance under which it was made, and the extent to which it has been published." *Developments in the Law—Defamation*, 69 HARV. L. REV. 875, 884 (1956). It has also been well suggested that the publications should be analyzed in light of the cultural values of the community in which it arises and upon which it has an impact. *See* Trakman, *Transforming Free Speech: Rights and Responsibilities*, 56 OHIO ST. L.J. 899, 919 (1995).

The various and inconsistent applications of the "other circumstances test" reflect a general lack of certainty in the courts' rationale on how to best balance the freedom guaranteed by the First Amendment and the need to provide a just recourse for undue harm suffered.

IV. The Decision Below Is Incorrect; Circuit Court's Failure To Apply The Standard Established By A Controlling State Intermediate Court Amounts To A Violation Of The Due Process Clause Under The Constitution

A. The Court of Appeals has failed to apply the "intensity of suspicion" test and its rationale established by the state intermediate court

The Second Circuit Court of Appeals held that in order for the petitioners to succeed on the defamation claim, the petitioners "were required to allege a statement by the defendants that was 'of and concerning' individual plaintiffs". Appendix 4a. It further stated that:

> Insofar as the articles refer to a group or class of which a plaintiff is a member, moreover, they would have been "of and concerning" the plaintiff only if the group or class were sufficiently small or circumstances otherwise indicated that the articles referred particularly to an individual plaintiff. Neither circumstance obtains here.

Appendix 5a (Internal citations omitted).

The circuit court found that:

> . . . the allegedly defamatory newspaper articles in the instant case do not refer specifically to any of the plaintiffs, instead, they are about either individual practitioners of Falun Gong who are not plaintiffs in this suit, Falun Gong itself, or the group of New York-based Falun Gong practitioners. They are therefore not "of and concerning" any of the plaintiffs.

Id.

The Second Circuit offered conclusive comments as the explanation for its decision. Its holding that the articles are not "of and concerning" the plaintiffs simply because the "articles . . . do not refer specifically to any of the plaintiffs" lacks principle and legitimacy, ignoring important laws and facts. It is unclear how the Second Circuit reached its conclusion that the articles do not "refer specifically to" the plaintiffs. Under New York law, the plaintiff does not have to be named in the publication in order to satisfy the "of and concerning" element. *Houbigant, Inc.*, 1996 WL 527334, *3; *New York Times Co. v. Sullivan*, 376 U.S. at 288. Extrinsic facts which are known to those who read or heard the publication may be used to satisfy the "of and concerning" requirement. *Id.* Affidavits from the record show how the readers in the communities where the respondent newspapers were distributed naturally understood the articles to be referring to plaintiffs and that plaintiffs were specifically targeted in the communities because of these articles.[10]

Although the Second Circuit cites *Brady* for its contention that the "of and concerning" element "required that the allegedly defamatory comment refer to the plaintiff", it is unclear how, if at all, the Second Circuit applied the "intensity of suspicion test"[11] explained in *Brady* to determine whether or not a

10. *See supra* note 6.

11. The test was a "flexible approach for balancing the competing interests present in group defamation actions." *Brady*, 445 N.Y.S.2d at 793. It will "prevent vexious actions based on impersonal discussions of matters of public concern without terminating suits on an arbitrary size limitation where real injury is present. *Id.* The court did consider the size of a group, but decided that "size is too narrow a focus to determine the issue of individual application in group defamation". *Id.* at 791-792 "It would also be illogical to afford greater protection to statements causing a greater number of wrongs." *Id.* at 792.

comment refers to the plaintiff. In its test, the *Brady* court considered public perception, whether the increased size is sufficient to dilute the harm, capability that the comment can be applied personally to the individual members of the defamed group, prominence of the group considered within the geographic area of publication and within the context of the allegation's subject matter, and repetition of the charges by the newspaper. None of these factors nor their applications were discussed in the Second Circuit's decision.

B. Second Circuit's failure to apply the "intensity of suspicion" test is inconsistent with the ruling of this Court and seriously violates the Due Process Clause of the Constitution

Instead of applying the "intensity of suspicion test" established by the Second Department of the New York Supreme Court, Appellate Division, the Second Circuit bypassed the state test. The court of appeals only briefly stated the size-oriented rule and concluded that for a group, unless it was small or there existed other circumstances for it to decide otherwise, the articles were not "of and concerning" the petitioners and it concluded in a cursory fashion that the petitioners had no claim for defamation against the respondents. *See* discussion *supra* IV.A.

Second Circuit's decision not to apply the state test is a constitutional error. This Court has held that "an announcement of state law by an intermediate appellate state court must be accepted by federal courts in absence of convincing evidence that law of state is otherwise." *Six Companies of California et al. v. Joint Highway Dist. No. 13 of State of California*, 311 U.S. 180 (1940), *reh'g denied*, 311 U.S. 730 (Jan. 6. 1941). *See also West et al. v. American Telephone & Telegraph Co.*, 311 U.S. 223 (1940)

(the state law required to be applied by federal courts may consist of rules of decision that have never been passed upon by highest court of state). Rather than prescribing a rule different from that used by the appellate division, the Second Circuit must apply the "intensity of suspicion test", even if it may have "departed from prior decisions of federal courts." *Id.*

The Fifth Amendment provides that "[n]o person shall . . . be deprive of . . . life, liberty, or property, without due process of law." For the reasons stated in this petition, the court of appeal's haphazard decision and its failure to apply the appellate division's test inconsistent with the ruling of this Court is a Constitutional error and has violated the Due Process Clause of the Constitution.

C. Any reasonable analysis of the defamatory statements leads to the conclusion that they are referring to the petitioners

Application of the "intensity of suspicion" test would allow the court of appeals to reasonably find that the defamation published by the respondent newspapers refer to the petitioners. By examining the various factors explained by the *Brady* court, court of appeals could reasonably find that the articles are referring to the petitioners.

The distinction that needs to be made is "between a generalization applicable to a class and a specific charge directed at a circumscribed group of individuals." *Brady* at 790-791. "[I]f the words may by any reasonable application, import a charge against several individuals, under some general description or general name, the plaintiff has the right to go on to trial, and it is for the jury to decide, whether the charge has the personal application averred by the plaintiff." *Brady* at 790-791 (internal citations omitted). The possibility

that the defamatory statements will be applied to Falun Gong practitioners worldwide as a whole does not interfere with a finding that the statements are "capable of personal application to the individual members of the defamed group", because since 1999 when the persecution started until the time when the case was brought, the membership of the defamed group had remained "constant and was easily discernable." *Id.* at 794.

The last element under the intensity of suspicion test is the "prominence" of the group. "Prominence . . . must be considered generally within the geographic area of publication or distribution of the defamatory allegation . . . and in the context of the allegation's subject matter." *Id.* at 795. Respondents' newspapers were distributed in the Chinese communities in New York City and these neighborhoods were the "kind of place where people know each other." *Id.* The prominence of the active New York practitioners was intensified, since 1999, throughout the distribution area of the newspapers. The China Press published more than 300 articles against Falun Gong in less than three years. This "compulsive repetition of the charge[s]" by the respondents "gives rise to the inference that [they] had access to special information which would negate the possibility that the charge of misconduct was an inexact generalization." *Id.* Even if some of the articles are found to be written in the form of an "opinion", "accusations of criminal activity, even in the form of opinion, are not constitutionally protected." *Id.* at 796. The rationale underlying this decision is that accusations of criminal behavior are factually laden opinions whose truth or falsity can be tested. *Id.*

Even for the cases that take "size" of the group as the determinant factor, they do not consider "size" to be the sole factor. To do so would be illogical and unjust. The requirement is to also examine the overall and relevant circumstances. In this case, the Jiang Regime tightly controls the media on the topic of Falun Gong. It intentionally falsifies information in an attempt to achieve its purpose of elimination. By being mouthpieces for the Jiang Regime in New York, the respondents purposefully publish the defamatory falsities to create hostility and hatred in the readers' minds against Falun Gong. The result is an effective way of creating hatred in the readers' mind against the Falun Gong practitioners in New York, where these practitioners live, work and have their social interactions. Thus, an attentive inquiry into the nature and extent of the atrocities committed against the group by the dictatorship and a thoughtful examination of the crucial role that the respondent press plays in the larger picture would raise many serious questions and provide a guidance as to the real circumstances underlying the case, allowing the courts to better address a poisonous spread of societal harm.

CONCLUSION

For all the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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Attorney for Petitioners

APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AUGUST 9, 2004

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 03-9156

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 9th day of August, two thousand and four.

PRESENT:

HON. ROSEMARY S. POOLER,
HON. ROBERT D. SACK,
HON. REENA RAGGI,

Circuit Judges.

FRIENDS OF FALUN GONG; FENG YAUN; LI LI; JANET XIONG; HANRU ZHU; MELA WU-MALIN; WAILING LAM; XUEMEI FENG; YAN LIU; MEI HONG; JIANFENG ZHOU; KE LI; ZHENMEI XU; FENGCHING CHANG; QI ZHANG; MEIMIAO LEE; LIANHUA ZIU; SHULING CHEN; CHAOFENG CHANG; DERONG ZHANG; WEI WU; QUEN SHA; XIUZHI JIANG; KUN CAI; CHUNMEI TSOI; MING ZHAI; TIANHENG SONG; ZHANGGUO SHI; FANGFANG JIANG; LISA KEI; CHIN PING CHENG; CONNIE PAN; YANG LI; WANLING CHUNG; FUNGFEI TONG; LANKIU CHANG; LAI KWAN LUM; LIN WANG; JIANMIN HUANG; HONG ZHAO; YANQIN XIA; JIAYING JIANG; HAIWEN YU; SHIHFUNG CHU; SHEUE

Appendix A

DIH WONG; EVA T. XU; SIU HA TAM; SEE CHIM LEE; RONG YI; TZE YUEN CHAN; CHANG GAO; HUI LING KO; WILLIAM CHAN; ALLAN WU; YUNQIN LI; SHI YIN CHEUNG; YAN ZUO; XU KANGANG; LORRAINE KABACINSKI; BETTY HUNTER BEATTY; SUZANNE ECKLER; HONG XIA JIA; XIN ZHAO; SEWMENG LEE; FATPING CHEUNG; DONGMEI LI; JAMES SMITH; LAN SING CHENG; YAHONG BAI; RUIQING LI; and SHUHUAN QU,

Plaintiffs-Appellants,

- v. -

PACIFIC CULTURE, d/b/a The China Press; SING TAO NEWSPAPERS NEW YORK, LTD., d/b/a Sing Tao Daily; and DAVID MUI,

Defendants-Appellees,

FAN DONGSHENG; LU ZIDAI; LI DAYE; SHAN HUAIHAI; and YANG HUIFEN,

Defendants.

Appeal from a September 26, 2003, judgment of the United States District Court for the Eastern District of New York (Carol B. Amon, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment be, and it hereby is, AFFIRMED.

Appendix A

SUMMARY ORDER

The plaintiff Friends of Falun Gong and the individual plaintiffs appeal from the September 26, 2003, judgment of the United States District Court for the Eastern District of New York (Carol B. Amon, *Judge*) granting the motion by the defendants China Press, Sing Tao Daily, and David Mui to dismiss the complaint. *See Friends of Falun Gong v. Pac. Cultural Enter., Inc.*, 288 F. Supp. 2d 273 (E.D.N.Y. 2003). On appeal, the plaintiffs contend that (1) they properly alleged a claim that the defendants violated 42 U.S.C. § 1985(3), (2) they properly alleged a claim under N.Y. Civ. Rights Law § 40-c, (3) they properly alleged a claim for defamation, (4) they were improperly denied leave to replead, and (5) the district court abused its discretion in exercising supplemental jurisdiction over the plaintiffs' state-law claims.

We assume, as we must at this juncture, that all the allegations made in the complaint are true. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993). The only question before us is whether, under that assumption and limiting ourselves, as we must, to what is contained in the complaint, the plaintiffs have adequately pleaded a violation of federal or state law. We conclude that they have not.

First, we think that the district court correctly determined that the plaintiffs did not plead a valid cause of action under 42 U.S.C. § 1985(3). The plaintiffs have failed to allege a conspiracy by the defendants either to deprive them of their First Amendment rights or to hinder governmental authorities from securing to them their First Amendment rights.

See Gyadu v. Hartford Ins. Co., 197 F.3d 590 (2d Cir. 1999). Even if N.Y. Civ. Rights Law § 40-c could serve as a predicate for a section 1985(3) violation, the plaintiffs have failed to allege any instances in which the defendants, by publication of the newspaper articles at issue, conspired either to deprive the plaintiffs of their rights under that state statute or to hinder governmental authorities from securing to them their rights under that statute. *See Jews for Jesus, Inc. v. Jewish Cmty. Relations Council of N.Y., Inc.*, 79 N.Y.2d 227, 234, 590 N.E.2d 228, 232, 581 N.Y.S.2d 643, 647 (1992).

Second and similarly, the district court correctly determined that the plaintiffs did not plead a valid cause of action against the defendants under N.Y. Civ. Rights Law § 40-c standing on its own. The plaintiffs did not allege any instances in which a plaintiff was harassed, as defined in N.Y. Penal Law § 240.25, or discriminated against with respect to his or her civil rights, as a result of the defendants' newspaper articles. *See id.*

Third, the district court also correctly concluded that the plaintiffs have no valid defamation claim on the face of their complaint. Defamation law protects only the individual reputations of persons and entities. To succeed on their defamation claim, the plaintiffs were therefore required to allege a statement by the defendants that was "of and concerning" individual plaintiffs. *See Celle v. Filipino Reporter Enters., Inc.*, 209 F.3d 163, 176 (2d Cir. 2000). This "requires that the allegedly defamatory comment refer to the plaintiff." *Brady v. Ottaway Newspapers, Inc.*, 84 A.D.2d 226, 228, 445 N.Y.S.2d 786, 788 (2d Dep't 1981) (citation omitted). But the allegedly defamatory newspaper

articles in the instant case do not refer specifically to any of the plaintiffs;* instead, they are about either individual practitioners of Falun Gong who are not plaintiffs in this suit, Falun Gong itself, or the group of New York-based Falun Gong practitioners. They are therefore not "of and concerning" any of the plaintiffs. *Cf. Church of Scientology Int'l v. Time Warner, Inc.*, 806 F. Supp. 1157, 1161 (S.D.N.Y. 1992) ("Without more, reference to the activities of individual Scientologists can not create a right of action in [the Church of Scientology]."), *aff'd sub nom. Church of Scientology Int'l v. Behar*, 238 F.3d 168 (2d Cir.), *cert. denied*, 534 U.S. 814 (2001). Insofar as the articles refer to a group or class of which a plaintiff is a member, moreover, they would have been "of and concerning" the plaintiff only if the group or class were sufficiently small or circumstances otherwise indicated that the articles referred particularly to an individual plaintiff. *See Abramson v. Pataki*, 278 F.3d 93, 102 (2d Cir. 2002). Neither circumstance obtains here.

Fourth, the district court did not abuse its discretion in denying the plaintiffs leave to replead because they were "unable to demonstrate that [they] would be able to amend [their] complaint in a manner which would survive dismissal." *Hayden v. County of Nassau*, 180 F.3d 42, 53 (2d Cir. 1999).

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* Two of the articles at issue allegedly include photographs of some of the plaintiffs. The complaint does not make a separate allegation with regard to these photographs. In any event, the publication of the photographs would not affect our analysis because the articles, including the photographs, do not contain anything that is capable of defaming these particular persons, rather than practitioners of Falun Gong generally.

Fifth, the district court did not abuse its discretion in exercising supplemental jurisdiction over the plaintiffs' state-law claims because all of the plaintiffs' federal- and state-law claims are about the defendants' newspaper articles—a common nucleus of operative fact that would ordinarily be expected to be tried in one judicial proceeding. *See New York by Abrams v. Terry*, 45 F.3d 17, 23 n.7 (2d Cir. 1995).

Finally, we note that the plaintiffs assert in their complaint that the articles published by the defendants contain false statements of fact about the plaintiffs that resulted in serious injury to them. Because the defendants asked the district court to dismiss the lawsuit on the basis of the contents of that complaint alone, and the district court did so, we are required to, and do, assume that the factual assertions of falsity and injury are true. The only question before us, then, is whether such alleged facts provide a basis under state or federal law for the specific legal action that the plaintiffs chose to bring. For the reasons stated above, we conclude that they do not.

The plaintiffs, in their complaint, express their disagreement with the sometimes harsh opinions that the defendants allegedly expressed in the articles about Falun Gong and its practitioners. We are foreclosed from making any judgment whatever as to the validity of those opinions, just as we are barred from making similar judgments with respect to the views held by the plaintiffs. We thus do not, by affirming the district court's dismissal of the complaint, make or imply any judgment as to any party's expressed beliefs.

Appendix A

In light of our conclusion, we need not reach the merits of the plaintiffs' other arguments.

For the foregoing reasons, the judgment of the district court is hereby AFFIRMED.

FOR THE COURT:

ROSEANN B. MACKECHNIE, Clerk

_____ _____

By: Date

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED SEPTEMBER 24, 2003

United States District Court,
E.D. New York.

No. 02 CV 4482 CBA.

Sept. 24, 2003.

FRIENDS OF FALUN GONG, et al.,

Plaintiffs,

v.

PACIFIC CULTURAL ENTERPRISE, INC., et al.,

Defendants.

MEMORANDUM & ORDER

AMON, District Judge.

Plaintiffs, Friends of Falun Gong, a non-profit organization dedicated towards the practice of Falun Dafa, and 67 of its individual members (collectively "plaintiffs" or "Falun Gong") bring this action against Pacific Culture Enterprise, Inc., doing business as *The China Press* ("CP"), and three of its writers and against Sing Tao Newspapers New York Ltd., doing business as *Sing Tao Daily* ("STD"),

and two of its writers/editors[1] (collectively "defendants") alleging a conspiracy to interfere with civil rights and to deprive individuals of legally protected rights or privileges in violation of *42 U.S.C. § 1985(3)*, as well as defamation, defamation per se, and prima facie tort in violation of New York common law, and a violation of *New York Civil Rights Law § 40-c*. Defendants moved to dismiss plaintiffs' complaint in its entirety pursuant to *Fed.R.Civ.P. 12(b)(6)*. For the reasons set forth below, defendants' motion to dismiss is granted.

BACKGROUND

According to the Amended Complaint in this action, Falun Gong is an association of individuals aimed at cultivating physical and spiritual values premised upon principles of truthfulness, compassion, and forbearance, collectively known as "Falun Dafa." (Am.Compl.¶ 11.) The plaintiffs in this action are all part of a sub-group of Falun Gong practitioners in the New York metropolitan area. (*Id.* ¶ 15.) The Amended Complaint alleges that both CP and STD are media outlets owned and/or controlled, either directly or indirectly, by the People's Republic of China ("PRC"). (*Id.* ¶ 26.) Plaintiffs contend that PRC has used both CP and STD to persecute practitioners of Falun Dafa in the United States, and in New York in particular. (*Id.* ¶ 20.) Plaintiffs allege that on or about July 20, 2001, the American Citizen's Anti-Evil-Cult Association ("ACAECA"), a New York based organization whose purpose is to spread

1. The named writers for *The China Press* are Lu Zidai, Li Daye, and Shan Huaihai and the named editors of *Sing Tao Daily* are David Mui and Yang Huifen.

propaganda about Falun Dafa practitioners, was formed with the defendants' full support. (*Id.* ¶¶ 28-29.) It is plaintiffs' contention that the defendants aided ACAECA's efforts to carry out this purpose by publishing a series of articles about plaintiffs. These articles form the basis for plaintiffs' state law claims.

I. *Procedural History*

On April 30, 2002, plaintiffs sought immediate injunctive relief in New York State Supreme Court in an effort to prohibit defendants from publishing further libelous or defamatory articles about the plaintiffs. On June 6, 2002, Justice Duane A. Hart heard plaintiffs' request for injunctive relief and denied such a request, finding "not one iota of evidence" that would justify an injunction against publication. Although Justice Hart denied plaintiffs' relief, he granted plaintiffs the opportunity to submit further evidence to support their position. As a result, plaintiffs obtained new counsel and amended their complaint to include, for the first time, a federal cause of action, which precipitated defendants' removal of this action from state court on August 13, 2002.

Appendix B

II. *Allegedly Defamatory Statements*

Plaintiffs allege that defendant CP made the following statements:

A. *The 2001 Articles*

- "The American government suppresses the public-endangering Davidian Cult and the People's Heavenly Palace Cult but supports Falun, which cruelly hurts Chinese people." (Am.Compl. ¶ 45.)

- "The Falun Gong evil cult is flagrantly detrimental, endangers society, deceives the world to gain fame, and has done many evils." (*Id.* ¶ 30.)

- "[ACAECA] had been formed and . . . was preparing to adopt specific means to prevent the evil cult from harming resident Chinese families and individuals." (*Id.*)

- "The U.S. should adhere to the international standard of behavior and establish an anti-evil-cult law to ban the intolerance and torture caused by evil religious faith." (*Id.* ¶ 31.)

- "The Chinese government's fight with 'Falun Gong' is a battle between righteousness and evil, between science and ignorance. It is what a responsible government, or any responsible government, must do." (*Id.* ¶ 32.)

Appendix B

- "[E]vil cult 'Falun Gong' killed someone for the sake of 'eliminating demons'." (*Id.* ¶ 35.)

- Local Falun Gong practitioners took pleasure in the WTC attacks (*Id.* ¶ 41.)

- Falun Gong practitioners suffer from a "psychological disorder," and readers are encouraged to join the New York Chinese United Federation for a meeting to "denounce Falun Gong" (*Id.* ¶ 51.)

- "After our newspaper and other New York Chinese media reported the news of how a Fujian descent youth, because of practicing Falun Gong, became psychologically disturbed, a few Falun Gong practitioner have begun to harass the people involved." (*Id.* ¶ 53.)

- "Even so, many people still don't understand why Falun Gong induces psychotic syndromes, nor the difference between the psychotic syndromes induced by Falun Gong and other psychopathic diseases. . . . The psychotic syndromes can be categorized into different types: schizophrenic, being easily irascible and depressed, hysteria-like psychotic syndromes, state of being possessed, hallucinatory, being restless and manic, and dogmatic with religious ideas." (*Id.* ¶ 54.)

- An article entitled "Beijing Falun Gong Fanatic Goes Mad Kills Father, Wife, and Injures Mother" described practitioners as having "twisted souls," subject to "mind control," and part of an "evil cult." (*Id.* ¶¶ 57, 60.)

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- "Falun Gong Gathering Outside of Our Gate Making a Scene" (in reference to efforts by Falun Gong practitioners to explain the truth to the paper's publishers). (*Id.* ¶ 63.)

- "[T]he noise from the amplifiers not only disturbed the normal operation of China Press, at the same time they also disturbed the normal work of others working inside the Asian Cultural Building." (*Id.* ¶ 64.)

- "[T]he management personnel from the building said that the protestors tried to break into the building several times, wanting to deliver their *open letter* to China Press's person in charge." (*Id.*)

B. *The 2002 Articles*

- "From the actions of Falun Gong, we see that this is strong evidence for Falun Gong instigating disorder. Falun Gong is not content by just causing disorder in China, came to New York, US, to cause disorder in the Chinese community." (*Id.* ¶¶ 69-70.)

- The Chinese Association Union believed that "the evil cult wanted to poison/confuse people's heart, which will bring bad influence in the Chinese American community." (*Id.* ¶ 71.)

- "There were many factors why the evil cult Falun Gong wreaking havoc hasn't stopped . . . misleading the practitioners to the path of a stubborn

superstition, self-important, demented unconscious, engenders a huge twisted effect to the personality of practitioners, and leads to self-destruction at the end." (*Id.* ¶ 72.)

- The three principles of Falun Gong should be changed to "hatred, shame, and outrage," Falun Gong is an "evil cult," and is similar to the KKK and the Branch Davidians. (*Id.* ¶¶ 74-76.)

C. *Statements by Defendant STD*

Plaintiffs' amended complaint contains only one alleged statement made by defendant STD:

- An article entitled "Radical Religions Advocating the Destruction of the World" stated that local Falun Gong practitioners were "anti-science, anti-society, anti-civilization," "misleading," "misguided," "self-destructive," and "evil" and associated practitioners with terrorists by juxtaposing pictures of Falun Gong practitioners with pictures of WTC attacks (*Id.* ¶¶ 36-39.)

DISCUSSION

Defendants argue that plaintiffs' amended complaint is defective as a matter of law, and therefore, should be dismissed because (i) plaintiffs' federal civil rights conspiracy claim fails to allege a conspiracy, a violation of a protected federal right, or any state action; (ii) plaintiffs' defamation and defamation per se claims rest on publications that are

not "of and concerning" any of the plaintiffs and are devoid of statements of fact; and (iii) plaintiffs' prima facie tort claim seeks recovery for allegedly libelous activity, which is not within the ambit of prima facie tort. In addition, CP argues that plaintiff's state civil rights claim fails because the statute at issue does not reach newspaper publication, and that many of plaintiffs' defamation claims are time-barred.

I. *12(b)(6) Standard*

In deciding a motion to dismiss for failure to state a claim upon which relief can be granted under *Fed.R.Civ.P. 12(b)(6)*, a court must accept the factual allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *See Press v. Chemical Inv. Servs. Corp., 166 F.3d 529, 534 (2d Cir.1999)*. Dismissal is proper "only where it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him to relief." *Scotto v. Almenas, 143 F.3d 105, 109-10 (2d Cir.1998)* (quoting *Branham v. Meachum, 77 F.3d 626, 628 (2d Cir.1996)*).

II. *Civil Rights Conspiracy under 42 U.S.C. § 1985(3)*

Defendants argue that plaintiffs' civil rights conspiracy claim, brought pursuant to *42 U.S.C. § 1985(3)*, should be dismissed as a matter of law because plaintiffs (i) fail to plead a conspiracy or meeting of the minds; (ii) fail to show that any alleged interference with a federal right was the result of state action; and because (iii) a predicate violation of state law, namely *New York State Civil Rights Law § 40-c*, cannot provide the basis for a federal civil rights conspiracy.

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To state a cause of action under the deprivation clause of *§ 1985(3)*, a plaintiff must allege (1) a conspiracy, (2) for the purpose of depriving a person or class of persons of the equal protection of the laws, (3) an overt act in furtherance of the conspiracy; and (4) an injury to the plaintiff's person or property, or a deprivation of a right or privilege of a citizen of the United States. *Thomas v. Roach, 165 F.3d 137, 146 (2d Cir.1999). Section 1985(3)* provides no substantive rights itself; rather, it merely provides a remedy for violation of the rights it designates. *Great Am. Fed. Sav. & Loan Assoc. v. Novotny, 422 U.S. 366, 372, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979)*. As a result, to maintain a claim pursuant to *§ 1985(3)*, there must be some predicate constitutional right which the alleged conspiracy violates. *See id.* at 376, *99 S.Ct. 2345; see also Emanuel v. Barry, 724 F.Supp. 1096, 1100 (E.D.N.Y.1989)*. In this case, plaintiffs allege that defendants engaged in a conspiracy to deprive them of their First Amendment rights to freedom of religion and association.[2]

1. *Conspiracy*

42 U.S.C. § 1985 creates a federal cause of action against persons who conspire to interfere with the civil rights of another. *See 42 U.S.C. § 1985*. Conspiracy is an essential element of a claim under *42 U.S.C. § 1985. Thomas, 165 F.3d at 146*. To properly allege a conspiracy claim, the

2. Plaintiffs appear to have initially alleged in their amended complaint a *§ 1985(3)* violation based on a conspiracy to deprive them of their civil rights pursuant to *New York Civil Rights Law § 40-c*. However, plaintiffs later argued that the claim under *§ 40-c* is a separate claim, and alleged only a conspiracy to deprive them of their First Amendment rights. Thus, the Court will not address the *§ 40-c* claim in the *§ 1985(3)* context.

complaint must contain specific factual allegations. "A complaint consisting of nothing more than conclusory or vague allegations of conspiracy is insufficient to survive a motion to dismiss." *Vertical Broad., Inc. v. Town of Southampton, 84 F.Supp.2d 379, 389-90 (E.D.N.Y.2000); see also Sommer v. Dixon, 709 F.2d 173, 175 (2d Cir.1983)* (holding that conclusory, vague, or general allegations of a conspiracy cannot survive a motion to dismiss).

Here, the complaint does not include any facts that could support an inference of a conspiracy among the various defendants. Instead, plaintiffs rely on conclusory allegations of concerted action. Plaintiffs cite no facts from which a meeting of the minds could be inferred. Simply alleging that the defendants published defamatory articles at the same time is not enough to state concerted action. Plaintiff's *§ 1985(3)* claim thus fails for failure to adequately plead a conspiracy.

2. *State Action*

Plaintiffs' *§ 1985(3)* claim fails, however, for a more fundamental reason. Here they rely on the deprivation clause of *§ 1985(3)* to allege that defendants influenced the state to deprive them of their rights under the First Amendment. (*See* Am. Compl. ¶ 98.) Plaintiffs readily concede that they do not claim any state involvement in the alleged conspiracy. (*See* Tr. of Oral Arg., Feb. 11, 2003.) This concession is fatal to their claim.

In *United Brotherhood of Carpenters v. Scott*, the Supreme Court held that when an alleged *§ 1985(3)* conspiracy is charged as violating First Amendment rights,

no cause of action exists "unless it is proved that the state is involved in the conspiracy or that the aim of the conspiracy is to influence the activity of the state." *463 U.S. 825, 830, 103 S.Ct. 3352, 77 L.Ed.2d 1049 (1983).* Plaintiffs in this case appear to be relying on the language in *Carpenters* suggesting that it is enough for a private conspiracy to "influence" state activity.

Since the decision in *Carpenters*, however, the Supreme Court has made it plain that there is no viable claim under the deprivation clause of *§ 1985(3)* for a private conspiracy aimed at rights that are protected only against state encroachment. In *Bray v. Alexandria Women's Health Clinic*, the Court held that the deprivation clause of *§ 1985(3)* does not apply to private conspiracies aimed at a right protected *only* against state interference. *506 U.S. 263, 278, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993).* The right to free speech under the First Amendment is indisputably such a right. *See id.* Plaintiffs reliance on *New York State NOW v. Terry, 886 F.2d 1339, 1360 (2d Cir.1989)* for the proposition that a *§ 1985(3)* cause of action may lie even when a plaintiff is injured by a purely private conspiracy is misplaced. *New York State NOW* stands for the proposition that no state action is required in a *§ 1985(3)* claim when the conspiracy is predicated on the violation of a constitutional right that is subject to both private and public encroachment, such as the right to interstate travel. As stated before, rights under the First Amendment are not rights that are subject to private encroachment, and *New York State NOW* is therefore not relevant.

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In an effort to salvage their claim, plaintiffs allege for the first time in their brief that they are relying on that clause of *§ 1985(3)* which provides a cause of action against those who conspire to "prevent[ ] or hinder [ ] the constituted authorities of any State or Territory from giving or securing to all persons . . . the equal protection of the laws. . . ." *42 U.S.C. § 1985(3)*. As an initial matter, this Court notes that plaintiffs may not raise a claim in a brief that is not set forth in the complaint to avoid dismissal. *See Friedl v. City of New York, 210 F.3d 79, 83-84 (2d Cir.2000)* ("A district court errs when it . . . relies on factual allegations contained in legal briefs or memoranda in ruling on a 12(b)(6) motion to dismiss.").

Even if the plaintiffs moved to amend their complaint to allege a violation of the hindrance clause, this claim would fare no better. First, it is an unsettled question whether the hindrance clause of *§ 1985(3)* can be applied to wholly private conspiracies aimed at rights protected only against official encroachment. The majority opinion in *Bray* left that question open, but suggested in dictum that a state action requirement would apply to the hindrance clause as well. *See Bray, 506 U.S. at 282-83, 113 S.Ct. 753.*

Since *Bray*, appellate courts appear divided on the issue. *See Tilton v. Richardson, 6 F.3d 683, 687 (10th Cir.1993)* (holding that claims under the hindrance clause must be based upon rights protected against both private and official interference); *but see Libertad v. Welch, 53 F.3d 428, 449-50 (1st Cir.1995)* (holding that claims brought under the hindrance clause do not require a state actor be involved in the conspiracy, even if the right interfered with is protected only against state encroachment).

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The Second Circuit does not appear to have addressed this issue since *Bray*. In a pre-*Bray* case, the Circuit held that state action was not required to state a colorable claim under the hindrance clause. *See Abrams v. 11 Cornwell Co., 695 F.2d 34 (2d Cir.1982)*. It is unclear what position the Circuit would take after *Bray*.

In any event, the Court need not resolve that issue here. Even if one concludes that *§ 1985(3)* prohibits wholly private conspiracies whose aim it is to hinder or prevent state authorities from securing constitutional rights of its citizens, the facts as alleged fail to make out such a claim. Plaintiffs point only to a series of newspaper articles that portray Falun Gong practitioners in an exceedingly bad light, and then reference the fact that there was a denial of a parade permit. There are no allegations that the articles advocated that plaintiffs be denied any First Amendment rights or that there was a correlation between the articles and the denial of the permit. Even if there were such a correlation, the fact that public officials might be "influenced" to act based upon press reports hardly rises to the level of hindering or preventing. To extend the limits of *§ 1985(3)* to cover every case in which an argument could be made that press reports, even libelous press reports, have influenced the decision-making of state officials would be to turn *§ 1985(3)* into the generalized federal tort law that it was clearly not intended to be. *See Bray, 506 U.S. at 269, 113 S.Ct. 753.*

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II. *Subject Matter Jurisdiction*

Plaintiffs' complaint alleges only one cause of action sufficient to invoke this Court's federal jurisdiction, namely the aforementioned § 1985(3) civil rights conspiracy. Because that claim has been dismissed, this Court must address whether it can or should exercise its supplemental jurisdiction under *28 U.S.C. § 1367(a)* to decide plaintiffs' remaining state law claims. Federal courts with jurisdiction over claims that raise a federal question may also exercise supplemental jurisdiction over all other claims that are "so related" as to form part of the same case or controversy. *See 28 U.S.C. § 1367(a)*. State law claims form part of the same case or controversy when they "derive from a common nucleus of operative fact" and are such that one would ordinarily expect them to be tried together. *People by Abrams v. Terry, 45 F.3d 17, 23, n. 7 (2d Cir.1995)* (quoting *United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966)*).

In deciding whether to exercise supplemental jurisdiction, the Court should consider whether such an exercise is justified by the interests of judicial economy, convenience, fairness to litigants, and comity. *See Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n. 7, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988)*. Where all federal claims have been dismissed before trial, these factors "point toward declining to exercise jurisdiction over the remaining state-law claims." *Id.* However, circumstances may arise that warrant the retention of jurisdiction. Such circumstances include (i) if the outcome of the claim is plain or (ii) if the outcome of the state law claim turns on federal law.

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See Waterman v. Transport Workers' Union Local 100, 8 F.Supp.2d 363, 369 n. 2 (S.D.N.Y.1998).

The Court chooses to exercise its supplemental jurisdiction in favor of deciding plaintiffs state law claims because the claims arise out of the same underlying facts, and the outcome of these claims is "plain." *See Id., 8 F.Supp.2d at 369 n. 2.* ("One reason to retain jurisdiction is if the outcome of the claim is plain. In this situation, considerations of judicial economy [warrant] retention and decision rather than relinquishment of the case to the state court." (internal quotations omitted)).

III. *State Law Claims*

A. *Defamation*

Defendants argue that plaintiffs' defamation claim must be dismissed because plaintiffs fail to show that defendants' statements are "of and concerning" the plaintiffs and, thus, are barred by the "group libel doctrine," and because the defendants' statements are statements of opinion, not actionable statements of fact. Plaintiffs argue, however, that the group libel doctrine is not a *per se* bar to a successful defamation claim and, as a result, their defamation claim should survive a motion to dismiss. Because it is plain to the Court that the defendants' statements are barred by the group libel doctrine, plaintiffs' defamation claim is dismissed.

A claim for defamation is actionable under New York law if the defendant made (i) a false and (ii) defamatory (iii) statement of fact (iv) of and concerning the plaintiff

(v) with the required degree of fault and (vi) special damages or per se liability. *See Celle v. Filipino Reporter Enters., Inc., 209 F.3d 163, 176 (2d Cir.2000).* However, under the "group libel doctrine," a plaintiff's defamation claim is "insufficient if the allegedly defamatory statements referenced the plaintiff solely as a member of a group." *Abramson v. Pataki, 278 F.3d 93, 102 (2d Cir.2002)* (quoting *Church of Scientology Int'l v. Time Warner, Inc., 806 F.Supp. 1157, 1160 (S.D.N.Y.1992)*); *see also Provisional Gov't of Republic of New Afrika v. Amer. Broad, Cos., Inc., 609 F.Supp. 104, 108 (D.D.C.1985)* (noting that defamation is personal such that statements which refer to an individual do not implicate the organization of which plaintiff is a member while statements which refer to an organization do not implicate its members). In order to overcome the group libel doctrine, a plaintiff must demonstrate that "the circumstances of the publication reasonably give rise to the conclusion that there is a particular reference to the member." *Church of Scientology, 806 F.Supp. at 1160* (quoting *Restatement (Second) of Torts, § 564A(b)*).

In this case, plaintiffs cannot demonstrate that any of the defendants' allegedly defamatory statements reasonably give rise to the conclusion that they particularly reference any of the plaintiffs, either as members of the group or an identifiable sub-group. Not one of the statements contained in plaintiffs' amended complaint references either the "Friends of Falun Gong" or any of the 67 individually-named plaintiffs. Further, plaintiffs' position that they constitute a "discrete, readily identifiable sub-grouping of Falun Gong practitioners located within the New York metropolitan area" (*see* Am. Compl. ¶ 15) fails to save their claim, as defendants' allegedly defamatory statements at most reference "New York

based Falun Gong practitioners," a group that far exceeds the particular plaintiffs.[3]

Plaintiffs nevertheless contend that their defamation claim should not be dismissed because the allegedly defamatory statements need not reference plaintiffs by name. To support that position, they principally rely on *Church of Scientology Int'l v. Time Warner, Inc.* In *Church of Scientology*, the plaintiff, Church of Scientology International ("CSI") brought a defamation suit for the alleged damages it suffered from a *Time magazine article entitled "Scientology: the Cult of Greed." 806 F.Supp. at 1158.* In that case, the plaintiff's complaint set forth six purportedly defamatory statements, none of which explicitly referenced CSI. However, the article featured a photograph of CSI, with a caption stating "Church of Scientology International headquarters, Los Angeles." *Id.* at 1161. The court found that references in the *Time* article to the "Church of Scientology," "the church," and to "the Los Angeles-based church" could reasonably be understood to refer to the plaintiff, "given CSI's capacity as 'Mother Church,' the hierarchical structure of Scientology, and the caption of the photograph identifying CSI's headquarters as being located in Los Angeles. . . ." *Id.*

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3. Defendants contend that there are millions of Falun Gong practitioners worldwide, and over one thousand New York based practitioners. Plaintiffs do not offer alternative numbers in response. Instead, plaintiffs respond by arguing that the actual number of group members alone is insufficient to bar a defamation claim and, further, that the individual plaintiffs need not be named. Although, both of plaintiffs contentions are correct, they set forth no viable legal argument to overcome the hurdle that their sheer numbers present, and no reason to believe that the particular plaintiffs in this case were identifiable within the group of New York based practitioners.

By contrast, the court found that any reference to "Scientology" or to acts of individual Scientologists could not be ascribed to CSI and, thus, were not actionable under the group libel doctrine. The court found that "[w]ithout more, reference to the activities of individual Scientologists can not create a right of action in CSI." *See id.* Plaintiffs' position here is akin to CSI's position with regard to the references to "Scientology." The court in *Church of Scientology* found that there were hundreds of other Scientology entities, and therefore a reference to "Scientology" in general could not be found to be "of and concerning" the plaintiffs. *See id.* Likewise, a reference to Falun Gong members cannot be said to reference either the individual plaintiffs or Friends of Falun Gong, given the number of Falun Gong practitioners and organizations. Plaintiffs' position is clearly distinguishable from CSI's position with regard to references to the "church," or the "Los Angeles-based church." Insofar as plaintiffs are claiming that they are the "equivalent" of the Los Angeles Scientology chapter, as the readily identifiable and official non-profit Falun Gong organization registered with the State of New York, they do not allege sufficient facts to demonstrate that references to the group as a whole could be attributed to plaintiffs. Although there are a few references to activities that take place in New York, there are no references to an organization of New York-based Falun Gong practitioners, or to any organization of Falun Gong practitioners at all.

Plaintiffs also rely on *Sovik v. Healing Network, 244 A.D.2d 985, 665 N.Y.S.2d 997 (N.Y.App.Div.1997)*, and this

reliance is equally misplaced. The plaintiffs in *Sovik*, an individual Hindu priest suing on behalf of all those similarly situated, and the Himalayan Institute of Buffalo, brought a defamation suit against The Healing Network for publishing a letter attributing sexual coercion of women to the teachings of the Himalayan Institute. *See id.* Although the letter at issue did not reference the individual named plaintiff, the court found that the statements sufficiently "of and concerning" the plaintiff to survive a motion to dismiss. *See id.* at 1000. The *Sovik* Court reached this conclusion because the individual plaintiff was one of only three Hindu priests in the United States, as well as the spiritual leader of the Himalayan Institute in Buffalo; he was one of 15 "senior teachers" in the United States; the allegedly defamatory statements were contained in a letter that was mailed to Institute members who would know the individual plaintiff as their spiritual leader, and the individual plaintiff was the only "senior teacher" located within a 300-mile radius of the Buffalo area. *See id.*

However, unlike the individual plaintiff in *Sovik*, who was an identifiable member of a small group of people, the individual plaintiffs here are 67 members of a significantly larger group. Further, plaintiffs are not "leaders" of the Falun Gong practice such that their identity is more readily discernible than the identify of a general group member. Accordingly, because plaintiffs cannot show that the circumstances of the defendants' allegedly defamatory publications reasonably give rise to an interpretation that they are "of and concerning" the plaintiffs, plaintiffs cannot

overcome the group libel doctrine and their defamation claim must be dismissed.[4]

B. *Prima Facie Tort*

Defendants argue that plaintiffs' prima facie tort claim must be dismissed because plaintiffs have simply restated their nonactionable defamation claim as a claim for prima facie tort. Plaintiffs contend that their claim is not a repetition of their defamation claim, but that the defendants have committed a prima facie tort by intentionally inflicting harm without any excuse or justification.

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4. Plaintiffs allege both defamation and defamation per se. New York recognizes certain statements as defamatory per se, meaning they are actionable without proof of special damages. *See Celle v. Filipino Reporter Enters., Inc., 209 F.3d 163 (2d Cir.2000).* The plaintiffs contend that defendants have committed defamation per se by alleging that plaintiffs committed criminal activity, which has typically been considered a category of speech that falls into defamation per se. *See Liberman v. Gelstein, 80 N.Y.2d 429, 590 N.Y.S.2d 857, 605 N.E.2d 344, 348 (1992).* However, plaintiffs still must prove the other elements of defamation. The only requirement the plaintiffs need not fulfill in a defamation per se claim is proof of special damages. *See Shor Int'l Corp. v. Eisinger Enters., No. 90 Civ. 2353, 1993 WL 452546, *5 n. 1, 2000 U.S. Dist. LEXIS 17478, at *12 n. 1.* Because the plaintiffs have not even shown that the statements were "of and concerning" the defendants, as discussed above, the claim for defamation per se fail as well. Accordingly, plaintiffs' claim of defamation per se is dismissed.

Because plaintiffs' defamation claim is dismissed under the group libel doctrine, the Court need not reach defendants' additional argument that the claim should be dismissed because the allegedly defamatory statements are statements of opinion rather than fact.

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To support a claim for prima facie tort, plaintiff must prove the following four elements: (i) intentional infliction of harm, (ii) causing special damages, (iii) without excuse or justification, (iv) by an act or series of acts that would otherwise be lawful. *See Hughes v. Patrolmen's Benevolent Ass'n, 850 F.2d 876, 882 (2d Cir.1988)*; *Procter & Gamble Co. v. Quality King Distrib., 974 F.Supp. 190, 198 (E.D.N.Y.1997)*. "[I]t is well-settled that any claim that is covered by a traditional tort cannot be the basis for a claim of prima facie tort—even if the traditional tort claims turn out not to be viable." *Nevin v. Citibank, 107 F.Supp.2d 333, 346-47 (S.D.N.Y.2000)*.

This principle has been applied in the defamation context. In *Nat'l Nutritional Foods Ass'n v. Whelan, 492 F.Supp. 374, 383 (S.D.N.Y.1980)*, the plaintiffs, a trade association of retailers, manufacturers, and distributors in the health food industry, alleged a prima facie tort against the defendants. Plaintiffs claimed that the defendants intentionally and maliciously inflicted harm by engaging in a conspiracy to publish articles containing false and defamatory remarks about the plaintiffs. The Court dismissed the prima facie tort claim, holding that the specific acts charged were "recognized as tortious in the law as defamation, and therefore, the remedies lie only in the classic categories of tort." *Id.* (internal quotation marks and citation omitted). The Court dismissed the claim even though it found that the same acts did not amount to libel or defamation, finding that "[i]t would make no sense . . . to deem certain expressions immune from suit as libel, and then find them sufficient in the identical factual context to constitute a prima facie tort. . . ." *Id.* at 384.

Similarly, plaintiffs here cite no new facts in support of their prima facie tort claim. In fact, plaintiffs specifically claim that it is the publishing of the allegedly false and defamatory articles by the defendants that gives rise to their claim of prima facie tort. Because the only specific acts alleged by the plaintiffs are the exact same facts that failed as a defamation claim, plaintiffs' prima facie tort claim is dismissed.

C. *New York Civil Rights Law § 40-c*

Plaintiffs allege a violation of *New York Civil Rights Law § 40-c*, claiming that defendants discriminated against plaintiffs on the basis of religious belief. *Section 40-c* states: No person shall, because of race, creed, color, national origin, sex, marital status, sexual orientation or disability . . . be subjected to any discrimination in his or her civil rights, or to any harassment, as defined in *section 240.25 of the penal law*, in the exercise thereof, by any other person or by any firm, corporation or institution, or by the state or any agency or subdivision of the state.

N.Y. CIV. RIGHTS LAW § 40-c (McKinney 2003).

Plaintiffs claim that the defendants' articles caused the discrimination and/or harassment of the plaintiffs in violation of the *New York Civil Rights Law. Section 40-d* of the Civil Rights Law establishes the penalties for "[a]ny person who shall violate any of the provisions of the foregoing section . . . or who shall aid or incite the violation of any of said

provisions. . . ."[5] *N.Y. CIV. RIGHTS LAW § 40-d (McKinney 2003).*

While the plaintiffs' claim is not entirely clear from their pleadings, they seem to allege that the defendants' articles caused Falun Gong members to be excluded from certain parades in New York, thereby "aiding or inciting" discrimination on the basis of religious belief. However, plaintiffs allege no facts that tie the activities of the defendants to the denial of permits for the parades. Within plaintiffs' amended complaint, there are two references to articles published by defendant CP regarding the denial of parade permits to Falun Gong members. Both articles, however, were reporting a denial that had already occurred, rather than encouraging parade organizers to deny access to the Falun Gong.

Plaintiffs rely on *Jews for Jesus, Inc. v. Jewish Cmty. Relations Council of New York, 968 F.2d 286 (2d Cir.1992)* as support for their claim. In *Jews for Jesus*, a resort cancelled its contract with Jews for Jesus after the Jewish Community Relations Council threatened that the Jewish community would boycott the resort if Jews for Jesus was allowed to use its facilities. The Second Circuit remanded the case to the district court, finding that the individual plaintiff could maintain an action under the New York Civil Rights Law if

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5. Plaintiffs cite *§ 41 of the Civil Rights Law* as the section which creates the private right of action against any person who violates *§ 40-c*. However, *§ 41* refers only to violations of §§ 40, 40-a, 40-b, or 42. *N.Y. CIV. RIGHTS LAW § 41 (McKinney 2003).* As plaintiffs cite only a violation of *§ 40-c*, *§ 40-d* is the applicable section here.

the plaintiff could show that "defendants aided or incited the [resort] to deny him accommodations directly or indirectly, for statutorily impermissible reasons." *Id.* at 294. Plaintiff's reliance on *Jews for Jesus* is misplaced for several reasons.

First, *Jews for Jesus* made clear that an organization cannot sustain a suit under this section. *Id.* at 293-94. *Section 40-c* provides that "no *person* shall . . . be subjected to any discrimination in his or her civil rights. . . ." *N.Y. CIV. RIGHTS LAW § 40-c* (emphasis added). In *Jews for Jesus*, the court held that "person" means "individual." *968 F.2d at 293*. Therefore, plaintiff Friends of Falun Gong, the entity, cannot maintain an action under *§ 40-c of the Civil Rights Law*.

Although the individually-named plaintiffs have standing to maintain an action under this section, their claim also fails, as they have failed to allege that they personally were discriminated against by the defendants. None of the sixty-seven individual plaintiffs allege that they personally were denied permission to march in a public parade. Instead, the amended complaint refers only to *Falun Gong* being denied access.

More to the point, plaintiffs' allegations do not sustain a showing that defendants' articles aided or incited Falun Gong's exclusion from the parade. In *Jews for Jesus*, the resort cancelled its contract with the plaintiff as a direct result of the threatened economic sanctions. Here, the only articles written by the defendants that reference the parades were written *after* Falun Gong had been denied permission to

march. Clearly, those articles were not the cause of Falun Gong's exclusion. In addition, as stated above, plaintiffs have not sufficiently alleged that any other articles, written before the parades took place, led to their exclusion.[6] Moreover, to find liability under this statute on the facts presented here would raise serious concerns as to the First Amendment rights of the defendants. *See Fed'n of Turkish-American Soc'ys, Inc. v. American Broad, Cos., 620 F.Supp. 56 (S.D.N.Y.1985).*

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6. Plaintiffs also cite no facts that would give rise to harassment within the meaning of *§ 40-c*. Harassment in this section is defined by *section 240.25 of the penal law*, which states:

> A person is guilty of harassment in the first degree when he or she intentionally and repeatedly harasses another person by following such person in or about a public place or places or by engaging in a course of conduct or by repeatedly committing acts which places such person in reasonable fear of physical injury.... *N.Y. PENAL LAW § 240.25* (Consol.2003).
>
> The plaintiffs allege that the defendants' articles have caused them to be inhibited from "freely practic[ing] their faith and associat[ing] without fear of verbal and physical reprisal." (Am.Compl.¶ 89.) However, they cite no facts alleging that anyone has physically threatened them at all, let alone threatened them as a result of the defendants' articles.

Plaintiffs, therefore, have not shown that they specifically have been discriminated against, or that the defendants' articles were the reason for any discrimination. *287 Therefore, plaintiffs' claim under *New York Civil Rights Law § 40-c* is denied.

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CONCLUSION

For the foregoing reasons, defendants' motion to dismiss is granted. The Clerk of the Court is directed to enter judgment in accordance with this Order and to close this case. SO ORDERED.

(3)

No. 04-636

Supreme Court, U.S.
FILED
DEC 9 - 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

FRIENDS OF FALUN GONG; *et al.*,

Petitioners,

—v.—

PACIFIC CULTURE ENTERPRISE, INC., d/b/a The China Press; SING TAO NEWSPAPERS NEW YORK, LTD., d/b/a Sing Tao Daily; and DAVID MUI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT PACIFIC CULTURE ENTERPRISE, INC. D/B/A *THE CHINA PRESS* IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Whether the Second Circuit erred in affirming a judgment of the district court which rejected, under New York's common law group libel concept, a defamation claim asserted against a New York–based Chinese-language newspaper by individuals and an organization who were not identified in the articles sued upon but who were merely followers of a worldwide spiritual movement reported on in the articles.

LIST OF PARTIES BELOW

The list of 70 individual petitioners included in the List of Parties in the Petition (Pet. ii) is not identical to the list of 67 individual plaintiffs included in the Amended Complaint (Am. Compl. caption and ¶ 3). The List of Parties in the Petition includes several individuals (Meimiao Lee, Xu Kangang, Lan Sing Cheng, Yahong Bai, and Shihuan Qu) who were not plaintiffs below but who were identified as Appellants on the Second Circuit appeal, and omits other individuals (Zhuli Chen and Lihua Zhao) who were plaintiffs below but not identified as Appellants on the Second Circuit appeal.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Respondent Pacific Culture Enterprise, Inc. d/b/a *The China Press* states as follows: Pacific Culture Enterprise, Inc. and *The China Press* have no parent companies and no publicly held company owns 10 percent or more of the companies' stock.

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Respondent Pacific Culture Enterprise, Inc. respectfully submits that the Petition for a writ of certiorari to review the Summary Order of the United States Court of Appeals for the Second Circuit entered on August 9, 2004 should be denied because no question worthy of the Court's certiorari jurisdiction is presented and no error was committed by the court below.

COUNTERSTATEMENT OF THE CASE

This case was commenced by the filing of a defamation complaint and a demand for a prior restraint on the publication of newspaper articles reporting on the actions of the religious and spiritual movement, Falun Gong. The complaint was filed on behalf of a large number of individual followers of the Falun Gong spiritual movement and a corporate entity, Friends of Falun Gong. That initial complaint was filed in New York Supreme Court, Queens County on April 30, 2002 and an order to show cause application was filed on May 17, 2002 seeking to restrain defendants from "printing or publishing further libelous articles defaming the plaintiffs." The complaint named as a defendant Pacific Culture Enterprise, Inc. doing business as *The China Press* (referred to herein as "*China Press*" or "Respondent"). The complaint also named four editors of or contributors to *The China Press* who have not been served, as well as another Chinese-language newspaper, Sing Tao Newspapers New York Ltd. doing business as *Sing Tao Daily*, and two of its employees and contributors.

A hearing on petitioners' application for an injunction against publication was held on June 6, 2002. After argument, the state court (Hart J.) denied the prior restraint that had been sought, while granting petitioners' request to submit additional papers a month later. Petitioners

then retained new counsel and, on July 19, 2002, served and filed an Amended Complaint in the state court realleging defamation and adding, for the first time, a claim of conspiracy to interfere with their civil rights in violation of 42 U.S.C. §1985(3).

Based on the presence of the newly added federal question, all the served defendants timely removed the case to the United States District Court for the Eastern District of New York on August 13, 2002. No motion to remand was made.

The *China Press* and *Sing Tao* defendants each timely moved to dismiss the Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim. United States District Judge Carol Bagley Amon heard argument on April 11, 2003 and granted both motions and dismissed Petitioners' entire complaint on September 23, 2003. (App. B).[1] The district court's twenty-page memorandum opinion held that the claims under 42 U.S.C. §1985(3) were defective both in failing to state facts sufficient to plead any conspiracy and in failing to allege the state action requisite to a §1985(3) claim based on an alleged deprivation of petitioners' First Amendment rights. (App. B, 15a–20a).

The district court exercised its supplemental jurisdiction over the remaining state law claims after concluding that these claims "arise out of the same

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[1] References in the form "Pet. __" are to the Petition for a Writ of Certiorari filed on November 8, 2004. References in the form "App. __" refer to Appendix A and Appendix B annexed to the Petition. References in the form "Am. Compl. __" are to the Amended Complaint filed on July 19, 2002. References in the form "JA __" are to the Joint Appendix filed with the Court of Appeals. References in the form "App. Br. __" are to the Brief and Special Appendix for Plaintiffs-Appellants Friends of Falun Gong et al. filed with the Court of Appeals on March 11, 2004.

underlying facts" and that the outcome of the claims "is plain." (App. B, 22a). The district court dismissed the defamation claims under New York's common law group libel doctrine as based on statements not "of and concerning" either the individual plaintiffs-petitioners or the corporate plaintiff-petitioner, none of whom is mentioned in any of the articles. (App. B, 22a–27a). The district court also dismissed claims of common law prima facie tort and violation of § 40-c of the New York Civil Rights Law. (App. B, 27a–32a).

A notice of appeal was filed on October 17, 2003. On August 9, 2004 the United States Court of Appeals for the Second Circuit issued a unanimous "Summary Order" affirming the judgment below. (App. A). That order stated that it would "not be published in the Federal Reporter and may not be cited as precedential authority to this or any other court." It affirmed the dismissal both of the claim asserted under 42 U.S.C. §1985(3) and of the New York Civil Rights Law claim. (App. A, 3a–4a). Neither of those claims is the subject of the Petition.

The summary order also determined that the district court had "correctly concluded that the plaintiffs have no valid defamation claim on the face of their complaint." (App. A, 4a). The Court of Appeals noted that plaintiffs were required to allege a statement "by the defendants that was 'of and concerning' individual plaintiffs" and that this " 'requires that the allegedly defamatory comment refer to the plaintiff.' *Brady* v. *Ottaway Newspapers, Inc.*, 84 A.D.2d 226, 228, 445 N.Y.S.2d 787, 788 (2d Dep't 1981)." (App. A, 4a). But, the Court held,

> "the allegedly defamatory newspaper articles in the instant case do not refer specifically to any of the plaintiffs; instead they are about either individual

> practitioners of Falun Gong who are not plaintiffs in this suit, Falun Gong itself, or the group of New York-based Falun Gong practitioners. They are therefore not 'of and concerning' any of the plaintiffs." (App. A, 4a-5a) (footnote omitted).

The Second Circuit did not reach (nor did the district court) the alternative basis for dismissal urged by respondents, *i.e.*, that the complaint alleged no false and defamatory statement of objective fact.

The petition for a writ of certiorari in this case addresses only the dismissal of the petitioners' defamation claims.[2]

COUNTERSTATEMENT OF FACTS

The claims asserted in the Amended Complaint stem from the publication of articles in *The China Press* and another Chinese-language newspaper that were critical of the religious and spiritual practices of Falun Gong, a group with membership in the "millions," according to the complaint (Am. Compl. ¶¶ 13, 18), of which petitioners claim to be local practitioners.[3] Petitioners are a New Jersey-based not-for-profit corporation known as Friends of Falun Gong and 67 individuals described in the Amended Complaint merely as "U.S. citizens or alien residents of the U.S. within the City and State of

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[2] It was undisputed that New York defamation law applied to those claims.

[3] All the articles in question appeared in the Chinese language. Petitioners' defamation claims are premised on their own English language translation of the highly nuanced Chinese original. Respondents pointed out below that the translations failed to comply with New York statutory requirements under N. Y. CPLR 2101(b). That issue was not reached below.

New York."[4] Falun Gong is described in the Amended Complaint as "an association of individuals aimed at cultivating physical and spiritual values" premised upon a system of religious and spiritual beliefs known as "Falun Dafa." The corporate petitioner ("Friends of Falun Gong") claims no governing authority or responsibility with respect to Falun Gong activities. Petitioners describe themselves collectively as a "part of a discrete, readily identifiable sub-grouping of Falun Gong practitioners located within the New York metropolitan area." [5] (Am. Compl. ¶ 15) The Amended Complaint does not allege that any of the 67 individual plaintiffs, or the corporate plaintiff, was mentioned in any of the articles.

The Amended Complaint challenges various articles published during the period from November 1999 to May 2002, alleging that the Respondents engaged in "relentless publication of false and defamatory statements concerning the Plaintiffs." (Am. Compl. ¶ 1). The Amended Complaint asserts that respondents "have acted as an unofficial mouthpiece for the Chinese government" with the aim of preventing Petitioners from engaging in the "exercise of their First Amendment privileges of association and expression." *Id.* Among other things, petitioners complain of allegedly defamatory articles that purportedly call Falun Gong an "evil cult" (according to petitioners' translations) whose practitioners have "twisted souls" and are "subject to 'mind

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[4] As noted above at page ii, although the Amended Complaint identified 67 individual plaintiffs (Am. Compl. ¶3), the List of Parties in the Petition (Pet. ii) lists 70 individual petitioners.

[5] On appeal to the Second Circuit, Petitioners acknowledged that they were part of (and not distinguishable) from a group of 120-350 New York practitioners of Falun Gong. (App. Br. 27-28).

control.' " (Am. Compl. ¶ 60). The Amended Complaint alleges that petitioners' newspapers are "owned and/or directly or indirectly controlled by the People's Republic of China" (Am. Compl. ¶ 26) and suggests that the newspapers have followed the Chinese government "line" in making various statements criticizing the Falun Gong movement (Am. Compl. ¶ 19-34); and see Petition at 3-4.

On the basis of the newspapers' articles, the Amended Complaint purported to set forth common law claims for "Defamation" (Am. Compl. ¶ 79-90) and "Defamation Per Se" (Am. Compl. ¶¶ 91-96) as well as other claims not at issue on this Petition.

REASONS FOR DENYING THE WRIT

Summary of Argument

The Second Circuit, in its Summary Order (designated not for publication), affirmed the district court's decision to dismiss petitioners' defamation claims by applying the group libel doctrine, long recognized under New York common law, to conclude that the allegedly defamatory statements are not "of and concerning" any of the petitioners. The application of this established state common law doctrine to preclude a libel claim here raises no question of constitutional law or other important question warranting this Court's review.

I.

THE GROUP LIBEL DOCTRINE LONG PRECEDED APPLICATION OF THE FIRST AMENDMENT TO LIBEL LAW AND DOES NOT RAISE ANY CONSTITUTIONAL ISSUE HERE

Petitioners assert that this Court's review is needed because it is "unclear if the 'of and concerning test' was constitutionally required" (Pet. 14) and because the circuit courts are "uncertain" what factors determine whether an individual member may recover for group defamation (Pet. 16). It is undisputed, however, that the decision of the Second Circuit, like the district court decision that the Court of Appeals affirmed, applied New York law and not any federal constitutional rule in dismissing the complaint:

The common law of New York has long recognized that defamation law protects only the individual reputations of persons or entities, and not the reputations of groups or sects. *See, e.g., Rykman* v. *Delavan*, 25 Wend. 186 (N.Y. 1840) ("[T]he libellous matter . . . must have been applied to the plaintiff as an individual, and not to a class of persons merely, when he sues for a personal libel on himself."); *Watts-Wagner Co.* v. *General Motors Corp.*, 64 F. Supp. 506, 508 (S.D.N.Y. 1945) ("In general, defamatory statements used broadly in respect to a general class of persons give no right of action to a member of the class, unless some circumstance makes the statements reasonably susceptible of special application to any individual of the class."). The common law of other states likewise has long imposed a bar against group libel. *See, e.g., Fowler* v. *Curtis Publishing Co.*, 182 F.2d 377 (D.C. Cir. 1950); *Brewer* v. *Hearst Publishing Co.*, 185 F.2d 846 (7th Cir. 1950) (Illinois law); *Owens* v. *Clark*, 6 P.2d 755 (Okla. 1932). Thus, long

before this Court held in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), that the First Amendment limits aspects of state defamation law, states through their common law, and New York in particular, through its common law, already limited claims that were premised on an alleged libel of and concerning an entire group.

Petitioners note that this Court has alluded to constitutional aspects of the "of and concerning" requirement in both *New York Times* v. *Sullivan*, 376 U.S. at 288 and *Rosenblatt* v. *Baer*, 383 U.S. 75, 82–83 (1966). (Pet. 14–15). Each of those cases involved a media defendant charged with libel for having published criticism of government activities without naming the specific individual plaintiff. Although the "of and concerning" requirement has constitutional dimensions in potentially *limiting* the reach of the common law tort of libel, those dimensions are not implicated here, since the Second Circuit applied the New York common law itself and found the claim wanting under that state's laws. There is no suggestion that a constitutional requirement could provide a basis to *expand* the reach of local defamation law. Indeed, in *Paul* v. *Davis*, 424 U.S. 693 (1976), this Court made clear that there is no constitutional basis for providing a libel claim to those to whom the state law has denied a claim.[6]

There is no "uncertainty" (Pet. 16) among the circuits concerning the application of the "of and concerning" requirement in the group libel context. To the extent that

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[6] In *Emerito Estrada Rivera-Isuzu de P.R., Inc.* v. *Consumers Union of United States, Inc.*, 233 F.3d 24, 28 (1st Cir. 2000) (cited by petitioners at Pet. 15), the First Circuit reviewed the constitutional precedents and concluded that it was "advisable" to decide the appeal of a libel judgment on local law grounds. The case did not suggest any basis rooted in the Constitution to override the limits on the scope of actionable libel imposed by local law.

the cases cited by petitioners may emphasize different factors for determining whether an individual plaintiff may recover for defamation of a group, such variations follow from the fact that each court was applying the controlling common law of the state in which the claims arose, as is required of the federal courts under *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938). *See, e.g., Schuster* v. *U.S. News & World Report, Inc.*, 602 F.2d 850, 854 (8th Cir. 1979) ("under Minnesota law defamation of a large group of persons was not actionable unless it could reasonably be understood to apply to a particular plaintiff"); *Michigan United Conservation Clubs* v. *CBS News, Inc.*, 665 F.2d 110, 112 (6th Cir. 1981) ("Under Michigan law 'it is not enough for a complainant to allege that he is a member of a group allegedly defamed.' ") (internal citation omitted); *Alvord-Polk, Inc.* v. *F. Schumacher & Co.*, 37 F.3d 996, 1015–16 (3d Cir. 1994) (Pennsylvania law; even statements that disparage a relatively small group may not serve as a basis for a defamation claim unless a reader could reasonably connect them to the individual plaintiff); *Fawcett Publications, Inc.* v. *Morris*, 377 P.2d 42, 51–52 (Okla. 1962) (plaintiff football player could maintain an individual action for libel where entire 50–60 person football team was defamed and plaintiff was readily identified with the team). One can hardly complain of a "lack of certainty" or absence of uniformity of decision where the source of law is the differing laws of the individual states.

II.

DISAGREEMENT AS TO THE CORRECT APPLICATION OF NEW YORK'S COMMON LAW GROUP LIBEL DOCTRINE DOES NOT RAISE AN ISSUE APPROPRIATE FOR THIS COURT'S REVIEW

Petitioners assert that a decision of one intermediate appellate court, *Brady* v. *Ottaway Newspapers, Inc.*, 84 A.D. 2d 226, 445 N.Y.S.2d 786 (2d Dep't 1981), sets out the controlling New York law and that the decision of the Second Circuit in this case was incorrect because the Circuit Court failed to apply or discuss the approach that was used by the *Brady* court. (Pet. 20-22). In *Brady* the New York Appellate Division, Second Department applied an "intensity of suspicion" test, after concluding that the test was "consistent with New York law." *Brady*, 84 A.D.2d at 237, 445 N.Y.S.2d at 793. The *Brady* court considered a number of factors, including the size of the group, in terms of definiteness in number and composition, public perception of the group's size, its degree of organization and the prominence of its members, in determining that the plaintiffs were sufficiently identified to permit their claims to survive the state's group libel bar. *See Brady*, 84 A.D.2d at 238-39, 445 N.Y.S.2d at 794-95.

Petitioners acknowledge that the Second Circuit cites the *Brady* decision in its discussion of the "of and concerning" requirement, yet they nonetheless fault the Circuit Court for failing to make clear "how, if at all, the Second Circuit applied the 'intensity of suspicion test' " and for not discussing in its decision the particular factors that had been considered by the *Brady* court. (Pet. 21–22). From those assertions, petitioners then leap to the conclusion that the Second Circuit committed an

error of constitutional magnitude by failing to apply the "intensity of suspicion" test. (Pet. 22). Petitioners present no support for their conclusion that the Second Circuit did not adequately consider *Brady* (which was discussed in the briefs and argument both in the district court and on appeal), let alone for the contention that an error in interpreting either the *Brady* decision or the body of New York law on group libel raises an issue of constitutional dimension.

More important, petitioners offer no basis for concluding that the ruling below is anything but one of New York law, which is not a question that warrants review by this Court. This Court routinely declines to review the determination of questions of state law by the intermediate federal appellate courts. *See Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944). *Accord Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 500 (1985) (deference to lower federal courts on questions of state law "reflect[s] our belief that district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective states"); *Butner* v. *United States*, 440 U.S. 48, 58 (1979) ("The federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues."); *Cort* v. *Ash*, 422 U.S. 66, 72 n.6 (1975) ("our practice of deference to such determinations should generally render unnecessary review of their decisions in this respect"); *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 534 (1949) ("We ordinarily accept the determination of local law by the Court of Appeals.").[7]

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[7] This Court has stated that it will defer to lower courts on state-law issues unless there is "plain error" or the view of the lower court is "clearly wrong" or "clearly erroneous." *Brockett* v. *Spokane Arcades, Inc.*,

III.

THE DECISION BELOW WAS PLAINLY CORRECT

To succeed on their defamation claim, petitioners must have alleged a defamatory statement by the defendants that was "of and concerning" the individual plaintiffs and not merely "an impersonal reproach of an indeterminate class." *Brady* v. *Ottaway Newspapers, Inc.*, 84 A.D. 2d at 228, 445 N.Y.S.2d at 788. Petitioners contend that by applying the "intensity of suspicion" test and examining the various factors that the *Brady* court considered, "the court of appeals *could* reasonably find that the articles are referring to the petitioners." (Pet. 23) (emphasis added). Even this cautiously worded prediction is overly optimistic. Whether a simple numerical approach or an "intensity of suspicion" test is applied, it is plain that the courts below correctly applied New York law in concluding that the articles upon which petitioners based their defamation claims are *not* "of and concerning" these petitioners.

The Court of Appeals recognized, and petitioners do not dispute, that petitioners have not identified any alleged defamatory statement that refers specifically to any individual petitioner or to the corporate petitioner, Friends of Falun Gong. (App. A, 4a–5a; *see also* App. B, 23a). The failure to refer to any plaintiff cannot be remedied by alleging that they are members of a large group that has been defamed. Petitioners pleaded that the arti-

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472 U.S. at 500 n.9 (internal citations omitted). As discussed in Part III below, nothing in the Petition suggests that this case was wrongly decided, let alone that it presents the exceptional circumstances necessary to warrant a departure from the Court's ordinary deference to the lower federal courts' interpretation of state law.

cles are "of and concerning" them because they are a "sub-grouping of Falun Gong practitioners" (Am. Compl. ¶ 15) or "New York City-based Falun Gong practitioners" (Am. Compl. ¶ 34). But under New York's common law group libel doctrine, defamation of any large group is not actionable by a member of the group or by an entity purporting to act on its behalf. *See, e.g.*, *Anyanwu* v. *Columbia Broadcasting System, Inc.*, 887 F. Supp. 690, 692 (S.D.N.Y. 1995) ("It is not sufficient that the plaintiff is libeled as a member of a large group."); *Church of Scientology International* v. *Time Warner, Inc.*, 806 F. Supp. 1157, 1160 (S.D.N.Y. 1992) ("Under the group libel doctrine, a plaintiff's claim is insufficient if the allegedly defamatory statement referenced the plaintiff solely as a member of a group. . . . Thus, if a plaintiff is libeled as a member of a large group, the 'of and concerning requirement' is not properly pleaded."), *aff'd*, 238 F.3d 168 (2d Cir.), *cert. denied*, 534 U.S. 814 (2001); *National Nutritional Foods Ass'n* v. *Whelan*, 492 F. Supp. 374, 380 (S.D.N.Y. 1980) ("New York follows the general common law rule, applied since *The King* v. *Alme & Nott*, 3 Salk. 224, 91 Eng.Rep. 790 (1699), that group libel is not actionable."); *Puerto Rican Legal Defense and Education Fund, Inc.* v. *Grace*, 9 Media L. Rep. (BNA) 1514, 1514-15 (Sup. Ct. N.Y. Co. 1983) (nonprofit Puerto Rican community organization may not sue on the basis of defamatory statements about Puerto Ricans).[8]

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[8] *See also Provisional Government of Republic of New Afrika* v. *American Broadcasting Cos.*, 609 F. Supp. 104, 108 (D.D.C. 1985) ("Allegations of defamation by an organization and its members are not interchangeable. Statements which refer to individual members of an organization do not implicate the organization. By the same reasoning, statements which refer to an organization do not implicate its members."); *Khalid Abdullah Tariq Al Mansour Faissal Fahd Al Talal* v. *Fanning*, 506 F. Supp. 186 (N.D. Cal. 1980) ("*Fanning*") ("[t]he aim of defamation law

Petitioners do not contest the fact that they are not specifically mentioned in the challenged articles, nor do they present any other basis to conclude that the articles focused specifically on them. Petitioners do not cite to any language in the articles or any circumstances surrounding respondents' publication of the statements that shows the alleged statements referred to these particular petitioners individually or as members of a specifically defined New York organization, as opposed to only as members of a larger group.

Courts applying a numerical approach to the group libel doctrine have generally held that the bar to recovery applies to groups of 25 or more. *See, e.g.*, *Alexis* v. *District of Columbia*, 77 F. Supp. 2d 35, 41 (D.D.C. 1999) ("The courts traditionally have required quite a small group—no more than 20 or 30 members—before they will hold that defamation of the group should be deemed to have particular application to a group member who is not named in the defamatory remarks."); Restatement (Second) of Torts § 564A comment b (1977); 1 Robert D. Sack, *Sack on Defamation: Libel, Slander and Related Problems* § 2.9.4, at 2-133 (3d ed. 2004). Although "New York courts have not set a particular group number above which defamation of a group member is not possible," the courts "have allowed individuals to pursue libel claims where they were identified as a member of a group of less than sixty." *Anyanwu* v. *Columbia Broadcasting System, Inc.*, 887 F. Supp. at 693 (dismissing defamation claims of group of over 500

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is to protect individuals; a group [there, Muslims] may be sufficiently large that a statement concerning it cannot defame individual group members"; granting motion to dismiss); *Mikolinski* v. *Burt Reynolds Production Co.*, 409 N.E.2d 1324, 1325 (Mass. App. Ct. 1980) (Polish-American Guardian Society may not sue on the basis of defamatory statements about Poles in motion pictures; affirming grant of motion to dismiss).

Nigerians engaged in international business with U.S. citizens).

Based on numbers alone, the Falun Gong group, with adherents numbering in the millions, is unquestionably too large to support an actionable claim of defamation by members of the group. (*See* Am. Compl. ¶ 13, quoting with approval a New York State resolution stating that "the practice has reached millions of people in 40 countries" and Am. Compl. ¶ 18, quoting with approval a U.S. House of Representatives resolution stating that Falun Gong has "millions of adherents in China and elsewhere.") Despite petitioners' efforts on appeal below to portray their "group" as "a contained group of New York practitioners known for their exercises in particular parks and other public locations" (App. Br. at 8), the Amended Complaint nowhere alleged that the 67 individual plaintiffs constitute all the New York practitioners nor provided a basis to distinguish these 67 plaintiffs from all other New York practitioners, let alone from the broader group of Falun Gong practitioners worldwide who are the subject of most of the allegedly defamatory references. Indeed, in their argument below, petitioners could not distinguish themselves from other "New York practitioners" whom they variously numbered as "120 active Falun Gong practitioners in New York City" (App. Br. 27-28) or 350 "practitioners in the New York area." (App. Br. at 28). Plainly, under the numerical approach the group is too large to support an "of and concerning" claim under New York law.

Analysis under the *Brady* court's "intensity of suspicion" test yields the same result. In *Brady* the court identified a number of factors for use in determining whether or not a defamation action survives the group libel doctrine. The factors include the size of the group, in terms of its definiteness in number and composition, the pub-

lic perception of the size of the group, its degree of organization and the prominence of its members. *See Brady*, 84 A.D.2d at 238-39, 445 N.Y.S.2d at 794-95.

As to size and degree of organization, petitioners' difficulty in defining the number of allegedly defamed New York practitioners of Falun Gong is itself telling. Petitioners break themselves into "two categories" in the Amended Complaint—the "Friends of Falun Gong" and 67 individual Falun Gong practitioners, described as "U.S. citizens or alien residents of the U.S. within the City and State of New York." (Am. Compl. ¶¶ 3-4). At oral argument on respondents' motions to dismiss, however, petitioners could not provide a precise number for the New York Falun Gong community but admitted "[i]t is more than 67."[9] (JA 530, ll. 10-16). Later, on appeal, petitioners variously claimed (without any support in the Amended Complaint or in the record) that there are "120 active Falun Gong practitioners in New York City" (App. Br. at 27-28) and then that "[a]t most, the practitioners in the New York area approximate 350" (App. Br. at 28).

In addition, although the Falun Gong practitioners suing for defamation are asserted to be based in New York (Am. Compl. ¶¶ 3-4), the principal focus of the articles, as petitioners themselves trumpet, is China: "All the 'homicides', 'immolations', other crimes and illegal actions supporting the conclusions in the reports *occur in China and not anywhere else in the world.*" (Pet. 4) (emphasis added). While the size of a group and the definitiveness of its composition are not the sole dispositive factors in determining whether the "of and con-

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[9] As noted above at page ii, although the Amended Complaint identified 67 individual plaintiffs (Am. Compl. ¶3), the List of Parties in the Petition (Pet. ii) lists 70 individual petitioners.

cerning" requirement has been sufficiently pleaded under the "intensity of suspicion test," *Brady*, 84 A.D.2d at 238-40, 445 N.Y.S.2d at 794-95, the fluid and uncertain number of New York Falun Gong practitioners, evidenced by petitioners' own pleadings and brief, militates against a holding that the size factor of the test has been adequately pleaded. Unlike the fluctuating group of New York Falun Gong practitioners in this case, the defined group of police officers at issue in *Brady* "was definite and its size was fixed in 1972." *Brady*, 84 A.D.2d at 239, 445 N.Y.S.2d at 794.

As to public perception of the size of the group, petitioners' allegations suggest a perception that the group is enormous. The Petition itself recognizes that the allegedly defamatory statements may well "be applied to Falun Gong practitioners worldwide as a whole." (Pet. 24). This view is simply inconsistent with the individualized identification that is required if a claim for defamation is to overcome the group libel bar. The fact that the articles refer both to local Falun Gong activities and to activities in China and elsewhere (Am. Compl. at ¶¶ 31, 53, 57, 70) militates in favor of a determination that public perception of the size of Falun Gong must be that it is both very large and geographically diverse. *See Brady*, 84 A.D.2d at 238, 445 N.Y.S. 2d at 794 ("Public perception of the size of the group is an important factor in focusing on the degree of suspicion attributed to individual members of the group irrespective of the actual size of the group."). Such a conclusion supports the determination that the district court's dismissal of petitioners' defamation claims under the group libel doctrine, and the Second Circuit's affirmance of that decision, were plainly correct.[10]

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[10] An alternative, independently sufficient basis for dismissal was presented to both the district court and the Court of Appeals but not

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Dated: New York, New York
December 10, 2004

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reached by either, namely the absence of any alleged false statement of objective fact, which is a *sine qua non* for liability both under federal law and under the still more demanding New York law. The "key inquiry is whether challenged expression, however labeled by defendant, would reasonably appear to state or imply assertions of objective fact." *Immuno AG v. J. Moor-Jankowski*, 77 N.Y.2d 235, 243, 567 N.E.2d 1270, 1274, 566 N.Y.S.2d 906, 910, *cert. denied*, 500 U.S. 954 (1991). Petitioners' defamation claims would not have withstood this basis for dismissal, as the Amended Complaint failed to identify any allegedly false and defamatory statements that amount to false statements of objective fact. The central theme in the Amended Complaint, for example, the repeated allegation that *The China Press* called the Falun Gong "an evil cult" (Am. Compl. ¶¶ 30, 35, 46, 49, 60, 65, 71, 72, 76, 82, 89), is precisely the type of subjective expression that does not constitute an actionable statement of fact.

(2)

No. 04-636

IN THE

Supreme Court of the United States

FRIENDS OF FALUN GONG, *et al.*,

Petitioners,

v.

PACIFIC CULTURE ENTERPRISE, INC., d/b/a The China Press; SING TAO NEWSPAPERS NEW YORK, LTD., d/b/a Sing Tao Daily; and DAVID MUI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS SING TAO NEWSPAPERS NEW YORK, LTD. AND DAVID MUI

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the courts below properly applied the settled principles of New York's common law of defamation to preclude members of a religious sect from asserting individual claims for damage to their own reputations allegedly resulting from a false and defamatory news report discussing only the practices of the sect itself?

LIST OF PARTIES BELOW

The list of petitioners identified in the Petition (at ii) does not match the list of individual plaintiffs named in the Amended Complaint (at ¶ 3). The list of petitioners includes five individuals who were not plaintiffs but were identified as appellants before the Court of Appeals (Meimiao Lee, Xu Kangpang, Lan Sing Cheng, Yahong Bai and Shihuan Qu), and excludes two individuals who were plaintiffs but did not participate in the appeal (Zhuli Chen and Lihua Zhao).

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

The ultimate parent company of Respondent Sing Tao Newspapers New York Ltd. is Global China Group Holdings Limited, a publicly held, Hong Kong-based corporation that is registered in Bermuda. The shares of the parent company are traded on the Hong Kong stock exchange. No other corporation or publicly held company owns 10% or more of the stock of Sing Tao Newspapers New York Ltd.

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PRELIMINARY STATEMENT

The Petition for a writ of certiorari to review an unpublished Summary Order of the United States Court of Appeals for the Second Circuit issued on August 9, 2004 should be denied. The Petition seeks further review of a straightforward application of the common law of New York that, like every other state, requires an allegedly libelous article to be "of and concerning" the named plaintiff. Because none of the articles challenged in this lawsuit identified any of the 68 plaintiffs who sought to assert individual libel claims, the pleading fundamentally failed to state a claim for libel. The Petition presents no federal question, raises no issue of uncertainty among the circuits, and presents no clear error of law that warrants further review by this Court.

COUNTER-STATEMENT OF THE CASE

A. Background

The 68 plaintiffs below were individual practitioners of Falun Gong, a Chinese spiritual sect, and an association devoted to supporting the Falun Gong practice. (8a)[1] Through this action they sought to assert several claims against two Chinese language daily newspapers published in New York City, based entirely upon their publication of unflattering reports about the Falun Gong religious sect.

Respondent Sing Tao Newspapers New York Ltd. ("Sing Tao") publishes one of the challenged newspapers,

1. References cited "__a" refer to Appendix A and Appendix B annexed to the Petition for a Writ of Certiorari filed on November 8, 2004. References to "JA __" are to the Joint Appendix filed with the Court of Appeals.

the *Sing Tao Daily* with a daily circulation of about 35,000. Sing Tao is owned by a privately-held company that has published the independent *Sing Tao Daily* in Hong Kong continuously since 1938.[2] Respondent David Mui, a U.S. citizen, was formerly the editor in chief of *Sing Tao Daily* in New York. (9a n.1.)

The claims asserted against Sing Tao arose out of its publication of just one article, a September 20, 2001 news report that briefly described a number of religious sects from around the world, including the "Solar Temple," "People's Temple," "Branch Davidians," "Supreme Truth" and others. (JA 366-67.) This article contained two-paragraphs about Falun Gong: one paragraph described generally the public teachings of the founder of the sect; the other repeated published news accounts about activities by Falun Gong practitioners in China, including "delay of medical treatments or suicidal acts, even self-mutilations" that resulted from its "anti-science and anti-society teachings." *See* JA 360, 366-67 (uncertified translation of Sing Tao article annexed to Amended Complaint). The Sing Tao article did not name or otherwise identify any of the 68 plaintiffs, and it described activities occurring only in China, not in New York area where the plaintiffs reside.

After the article was published, Sing Tao received several letters from Falun Gong practitioners, who objected to the accuracy of its depiction of their sect, including an October 21, 2001 letter from an attorney who "serve[d] notice" that the article gave rise to claims for defamation by Falun Gong practitioners. (JA 494-96.) Never intending to misrepresent Falun Gong, Sing Tao immediately negotiated with this

2. *See* http://www.globalchina.com/eng/media_ownership_services.shtml.

attorney and reached an agreement to resolve the dispute by publishing an article about Falun Gong written entirely by practitioners of Falun Gong, without editorial revision or comment by Sing Tao. (JA 497.) Good to its part of the bargain, on October 28, 2001 the *Sing Tao Daily* carried a full-page article written *entirely* by local practitioners of Falun Gong. (JA 498.)

B. Procedural History and Nature of the Claims Asserted

Notwithstanding the implementation of this settlement, and the absence of *any* further reports about Falun Gong appearing in *Sing Tao Daily*, some six months later Sing Tao was served with a state court Complaint alleging libel based on the original September 20, 2001 news report, and an Order to Show Cause demanding an emergency injunction to prevent any further publication of defamatory articles about Falun Gong. (JA 15-17.) The pleadings did not mention the settlement agreement, the favorable, in-depth report published on October 28, 2001, or the absence of any further stories warranting any emergency judicial action.

The libel claims against Sing Tao asserted that each of the plaintiffs was personally defamed because the September 21, 2001 article, *inter alia*, falsely described the teachings of Falun Gong's founder as being "anti-science, anti-society, anti-civilization," and falsely described some Falun Gong practitioners in China as having delayed medical treatments and participated in self-mutilation. (JA 146, 147 at ¶¶ 37-40, 49.)

The New York state court (Hart, J.), rejected out of hand petitioners' initial demand for an order prohibiting *Sing Tao Daily* and its primary competitor, *China Press*, from

publishing any "further libelous articles defaming the plaintiffs" or "any photographs of the plaintiffs without their consent." (JA 127, 134.) The state court found not "one iota of evidence" to justify such a prior restraint. (10a.)

Petitioners then filed an Amended Complaint dropping certain parties and causes of action, and adding a new federal cause of action under 42 U.S.C. § 1985(3) ("Section 1985(3)"). Respondents timely removed the case to the District Court for the Eastern District of New York on August 13, 2002. (10a.) No request for remand was made.

The Amended Complaint advanced several theories of liability: (1) a private conspiracy in violation of Section 1985(3) to abridge petitioners' freedom of religion by publishing false information about their spiritual practices, (2) individual claims of defamation asserted by each of the 68 plaintiffs, none of whom was alleged to be a leader in the Falun Gong sect or to have been identified in the challenged news report, and (3) a tag-along claim for "prima facie tort" that was not pursued on appeal. (JA 156.) The pleading also referred obliquely to a violation of New York Civil Rights Law § 40-c, in asserting a conspiracy to violate the freedom of religion (JA 155 at ¶ 101), and the courts below treated this as an inartfully drafted independent state law claim. (4a; 29a.)

C. The Holdings of the Courts Below

District Court Dismissal. Respondents moved under Fed. R. Civ. P. 12(b)(6) to dismiss the Amended Complaint in its entirety for failure to state a claim. (14a-15a.) Their motions were granted by the District Court (Amon, J.) on September 26, 2003. (8a-33a.) The Section 1985 claim was dismissed

because the Amended Complaint failed to plead "any facts that could support an inference of a conspiracy among the various defendants" (17a), and even accepting the possibility of a conspiracy, failed to allege the involvement of a constitutional "state actor," a necessary prerequisite to any claim for the violation of rights protected only against state encroachment. (18a-20a.)

Recognizing that all the claims alleged were "so related" as to form a part of the same controversy, and after weighing "the interests of judicial economy, convenience, fairness to litigants, and comity," Judge Amon decided to exercise subject matter jurisdiction over the pendent state law claims, whose outcome was "plain." (21a-22a.) The district court found the libel claims to be flatly precluded because the allegedly defamatory statements do not "reasonably give rise to the conclusion that they particularly reference any of the plaintiffs" (23a), and the common law "group libel" doctrine bars an individual from bringing a claim for libel based only upon statements about a group to which he or she belongs. (23a-26a.) The district court found that the individual libel claims were barred both because of the "sheer numbers" of Falun Gong practitioners in New York, admitted by petitioners to exceed several hundred in New York alone and millions worldwide (Appellants' Br. at 28), and because the petitioners offered "no reason to believe that the particular plaintiffs in this case were identifiable within the group of New York based practitioners." (24a & n.3.)

The district court further concluded that no claim was stated under New York Civil Rights Law § 40-c because none of the individual plaintiffs alleged that he or she had suffered any specific act of religious discrimination as a result of challenged publications (JA 559), and dismissed the claim

for prima facie tort as barred by the First Amendment (JA 556-57), a holding not challenged on appeal.

Summary Affirmance by the Court of Appeals. In an unpublished Summary Order, the Court of Appeals (Pooler, Sack and Raggi, C.J.J.) affirmed the dismissal. The Second Circuit found that the district court had properly rejected the Section 1985(3) claim because the Amended Complaint "failed to allege a conspiracy by defendants either to deprive them of their First Amendment rights or to hinder governmental authorities from securing to them their First Amendment rights." (3a.) The court found the conspiracy allegations similarly defective in attempting to state a claim based upon a violation of New York Civil Rights Law § 40-c. (4a) These claims are not pursued in the Petition, which seeks only this Court's review of the adequacy of the state law claims for libel.

The Second Circuit affirmed the district court's holding that no libel claim was stated by any of the 68 plaintiffs because none of the challenged articles is about them. As the Court of Appeals observed, the challenged articles instead "are about either individual practitioners of Falun Gong who are not plaintiffs in this suit, Falun Gong itself, or the group of New York-based Falun Gong practitioners. They are therefore not 'of and concerning' any of the plaintiffs." (5a.) In reaching this conclusion, the Court applied the New York common law standard, as articulated in *Brady v. Ottaway Newspapers, Inc.*, 84 A.D.2d 226, 228, 445 N.Y.S. 2d 786, 788 (2d Dep't 1981), which requires that "the allegedly defamatory content refer to the plaintiff." (4a.)

REASONS FOR DENYING THE PETITION

THE PETITION RAISES NO FEDERAL QUESTION AND PRESENTS NO CLEAR ERROR OF STATE LAW

A. Petitioners' Libel Claims Were Properly Dismissed Under the Common Law of New York

The courts below dismissed the individual libel claims advanced by 68 plaintiffs purely as a matter of state common law. Applying the long-standing requirement that an allegedly libelous article must be "of and concerning" the named plaintiff, the courts below readily concluded that petitioners had not, and could not, make the necessary showing. The district court observed that the challenged articles do not identify petitioners "either as members of a group or an identifiable sub-group" (23a), and do not "reasonably give rise to an interpretation that they are 'of and concerning' the [petitioners]." (26a.) The Court of Appeals summarily affirmed, finding the pleading to be defective "on its face" because none of the articles were "of and concerning" any of the petitioners, and the common law allows individuals to sue for defamatory comments about a group to which they belong only when the group is "sufficiently small or circumstances otherwise indicated that the articles referred particularly to an individual plaintiff. Neither circumstance obtains here." (5a; citation omitted.)

The common law requirement that a libel must be "of and concerning" a named plaintiff is long-standing, easily understood and consistently applied. *See, e.g., Albert v. Loksen*, 239 F.3d 256, 265-66 (2d Cir. 2001) ("of and concerning" is a necessary element of a defamation

plaintiff's burden of proof); *Geisler v. Petrocelli*, 616 F.2d 636, 640 (2d Cir. 1980) (libel plaintiff must show that defamation statement specifically refers to plaintiff); *Fetler v. Houghton Mifflin Co.*, 364 F.2d 650, 651 (2d Cir. 1966) (same); *see also*, 1 Sack on Defamation § 2.9 at 2-126 (3d ed. 2004). The "group libel" doctrine as applied in New York is simply an application of this principle, providing that an allegedly false statement about a group is not generally "of and concerning" any individual member of the group. *See, e.g., Church of Scientology Int'l v. Behar*, 238 F.3d 168, 173 n.1 (2d Cir. 2001); *National Nutritional Foods Ass'n v. Whelan*, 492 F. Supp. 374, 380 (S.D.N.Y. 1980); *In re Houbigant, Inc.*, 182 B.R. 958, 974 (Bankr. S.D.N.Y. 1995).

Petitioners argue that the courts below failed to apply the group libel doctrine as required by the common law of New York (Pet. 20-24), but the contention is plainly without merit. The Court of Appeals relied upon the very state court authority petitioners say should be controlling, *Brady v. Ottaway Newspapers, Inc.*, 84 A.D. 2d 226, 445 N.Y.S.2d 786 (2d Dep't 1981), and found that the Amended Complaint failed to pass muster under a simple application of this precedent. (5a.) Petitioners object that the Second Circuit could not properly have applied the "intensity of suspicion" standard embraced in *Brady*, and must have mistakenly applied a strict numerical standard (20a-22a), but the Summary Order notes *both* that the group of Falun Gong practitioners (at least several hundred in New York City and millions worldwide) would generally be considered too large to allow an unnamed member to claim reputational damage from an article about the group, *and* that no other circumstances "indicated that the articles referred particularly to an

individual plaintiff." (5a.) This holding is consistent with the settled law in New York.[3] *See* Sack on Defamation at 2-126 - 2-128 (citing cases); *see also, e.g., Neiman-Marcus v. Lait*, 13 F.R.D. 311, 316 (S.D.N.Y. 1952) (no libel claim for members of a group of 382); *Sacco v. Pataki*, 114 F. Supp. 2d 264, 271 (S.D.N.Y. 2000) (no libel claim for members of a group of over 1000 people), *aff'd sub nom Abramson v. Pataki*, 279 F.3d 93 (2d Cir. 2002)

Of course, even if the Second Circuit had misperceived the law of New York, which it did not, such an error of state law would not present a question warranting further review by this Court. *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944); *accord Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500 (1985) (lower courts are "more able to interpret the laws of their respective [s]tates"); *Ragan v. Merchants Transfer and Warehouse Co.*, 337 U.S. 530, 534 (1949) ("We ordinarily accept the determination of local law by the Court of Appeals"). This is particularly so given that the application of the common law doctrine in this case did not require any extension of existing law. Indeed, with regard to Sing Tao, the facts presented only reinforce one reason for the very existence of the doctrine—to prevent the unwarranted proliferation of litigation. Upon receiving a complaint from one group of Falun Gong practitioners, not identified in its story, Sing Tao agreed to run a full

3. The Petition is equally incorrect in its further suggestion (at 22-23) of a due process violation because the Summary Order of the Second Circuit does not state more explicitly how it applied the *Brady* decision to this dispute. *See, e.g., Taylor v. McKeithen*, 407 U.S. 191, 194 n.4, (1972) ("courts of appeals should have wide latitude in their decisions of whether or how to write opinions").

page story to set the record straight. Six months later, it was sued by a second group of Falun Gong practitioners, also not identified in the story. The group libel doctrine properly seeks to avoid the chilling impact of just such claims by individual members of groups who dislike the reporting about their organizations.

Petitioners' libel claims were properly dismissed purely as a matter of New York law.

B. There Is No Disagreement Among the Circuits About the Scope of New York's Libel Law

Petitioners are just as misdirected in claiming widespread uncertainty about the application of New York law to libel claims brought by members of groups. It has long been recognized that New York law limits libel recoveries to situations where an alleged libel is "of and concerning" the plaintiff, and in a group context the courts regularly look to both the actual size of a group and other circumstances that might uniquely identify and harm a specific member of the group—exactly what the courts did here. *See, e.g. Abramson v. Pataki*, 278 F.3d 93, 102 (2d Cir. 2001) (under New York law no libel claim for union members based on statement accusing some employees of criminal behavior); *Anyanwu v. Columbia Broad. Sys., Inc.*, 887 F. Supp. 690, 693 (S.D.N.Y. 1995) (under New York law no libel claim for a Nigerian doing business in the U.S. based on defamatory reference to all Nigerians doing business in the United States); *Church of Scientology Int'l v. Time Warner, Inc.*, 806 F. Supp. 1157, 1160-62 (S.D.N.Y. 1992) (under New York law no libel claim could be brought by an individual church for statements critical of the religion to which it belonged),

aff'd sub nom Church of Scientology Int'l v. Behar, 238 F.3d 168 (2d Cir. 2001); *National Nutritional Foods Ass'n*, 492 F. Supp. at 380-81 (under New York law no libel claim could be brought by individuals in health food industry for statements critical of that industry). Similar limitations on libel claims by members of groups exist in all 50 states. *E.g.*, *Brock v. Thompson*, 948 P.2d 279, 292 (Okla. 1997) (no libel claim for statement denigrating all Oklahoma plaintiffs' lawyers); *Kentucky Fried Chicken of Bowling Green, Inc. v. Sanders*, 563 S.W.2d 8, 8-9 (Ky. 1978) (no libel claim by local franchisee based on complaints about the quality of Kentucky Fried Chicken food).

Although the precise contours of the group libel doctrine may vary from state to state, as suggested by the differing language used in cases from different jurisdictions cited in the Petition (at 16-19), there is no ambiguity or uncertainty about the scope of New York's common law of libel as applied to the members of groups. The Petition presents nothing to the contrary.

C. New York's Limitation on Group Libel Claims Does Not Violate Petitioners' First Amendment Rights

Petitioners strain to argue some implicit constitutional problem with the holding below, when none exists. They note that false speech is not constitutionally protected, and suggest that the group libel doctrine as applied in this case improperly protects false speech. (Pet. 12-13.) Far from undercutting the principles enunciated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), however, the group libel doctrine exists at common law

to avoid otherwise unacceptable restrictions on free speech. Members of large groups are barred from asserting individual defamation claims based on reports that do not specifically identify them, in order to prevent "the unwarranted proliferation of litigation and its attendant cost to free expression." Sack on Defamation at 2-134; *see also* Restatement [Second] Of Torts § 564A, cmt. a (1977-2004).

A defamation judgment not constrained by the "of and concerning" element might well run afoul of the First Amendment by chilling protected speech. *See Rosenblatt v. Baer*, 383 U.S. 75, 81 (1966) (evidence must show that a false and defamatory statement was "specifically directed at the plaintiff"); *Talal v. Fanning*, 506 F. Supp. 186, 187 (N.D. Cal. 1980) ("[i]f the court were to permit an action to lie for the defamation of such a multitudinous group [as adherents to the Islamic Faith] we would render meaningless the rights guaranteed by the First Amendment to explore issues of public import"); *Puerto Rican Legal Defense Fund v. Grace*, 9 Media L. Rep. 1514, 1516 (Sup. Ct. N.Y. Co. 1983) (permitting lawsuit that would restrict discussion about racial or ethnic groups could "inhibit the free and open discussion of matters of public interest, and conflict with First Amendment guarantees"). The converse, however, is not true. *See Paul v. Davis*, 424 U.S. 693, 710-12 (1976) (no constitutional basis to require a state to provide a libel cause of action where one is denied by state law).

The application of the common law doctrine in this case did not subvert any First Amendment protection of petitioners' reputations, and the straightforward application of New York's libel law below presents no constitutional issue.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 04-636

IN THE

Supreme Court of the United States

FRIENDS OF FALUN GONG, *et al.*,

Petitioners,

v.

PACIFIC CULTURE ENTERPRISE, INC., d/b/a The China Press; SING TAO NEWSPAPERS NEW YORK, LTD., d/b/a Sing Tao Daily; and DAVID MUI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioners' corporate disclosure statement was set forth at page *ii* of the Petition for a Writ of Certiorari, and there are no amendments to that statement.

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REPLY TO THE OPPOSITION
STATEMENT OF FACTS

Respondent Sing Tao Newspapers New York, Ltd. ("STN") published a full-page article in color on September 20, 2001 labeled "Special Edition" that included defamatory false statements against Falun Gong. C.A. App. A-366.[1] A letter from an attorney on behalf of the practitioners of Falun Gong in the New York area was sent to STN on October 24, 2001, notifying STN that the malicious false statements in the article "could be grounds for and bring about various claims in defamation." C.A. App. A-494. The letter further stated that

> [b]y way of Sing Tao's publication of irresponsible articles, such as the one in question, with its intent of misleading the public, reasonable persons could surmise that the negative propaganda (and perhaps also persecution) against Falun Gong in China, which are condemned by international community and law, are now attempting to find their imported acceptance into the United States contrary to the law and values of the[] United States.

C.A. App. A-496.

STN never contacted such attorney nor attempted to respond to her letter. Consequently, there was never a settlement. Three Falun Gong practitioners by the names of Kangang Xu, Wei Lu, and Yun Song wrote a letter jointly, dated October 25, 2001, to Respondent David Mui, requesting him to make an effort to reduce the harm caused by the September 20, 2001 article to the New York communities and the New York practitioners of

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1. "C.A. App. A- _____" refers to the page in the Appendix filed with the Second Circuit Court of Appeals. "Pet. p. ____" or "Pet. pp. ____" refers to the page(s) in the Petition for a Writ of Certiorari filed with this Court on November 8, 2004. "Pet. Fn. ____" refers to the footnote in such Petition.

Falun Gong. C.A. App. A-497. Kangang Xu and Wei Lu have subsequently joined as Plaintiffs in the case. Although STN later published an article provided by Falun Gong, STN unilaterally inserted an editorial comment into the article, attributing responsibility of all Falun Gong statements in the September 20, 2001 article to its headquarters in Hong Kong and Communist China. Following STN's publication of the article on October 25, 2001, STN published further defamatory false articles, including one on April 5, 2002, damaging the reputation of the petitioners by, *inter alia*, repeating fabricated and staged news concerning a self-immolation at Tiananmen. C.A. App. A-362.

REASONS IN FURTHER SUPPORT OF GRANTING THE PETITION

I. This Court's Guidance Is Immediately Imperative And Necessary To Protect The Laws Guarding Good And Honorable Reputation From Intentional Defamatory Falsehoods And To Protect The Integrity Of The Freedom Of Press

The respondents' failure to follow the most fundamental journalistic ethics raises serious questions as to the real role of their newspapers. Not in operation to serve the general welfare of the readers—evidenced by the continuous publication of defamatory and fabricated materials—the respondents' newspapers depart fundamentally from the media operative in the cases cited by the respondents, and, thus, necessitate that the respondents not be afforded the same rights and protections as those of the traditional media defendants.[2]

2. The fact that a Communist Chinese regime involved in the torturing and killing of practitioners who practice Falun Gong is spreading intentionally false materials in the United States might be in violation of the Foreign Agents Registration Act of 1938 (Act). The Act requires registration, reporting, and disclosure by persons engaging in the propaganda on behalf of foreign powers.

The majority of the cases cited by the defendants to support the use of the size of the group as a determinant factor for recovery involves media that are fundamentally different from the ones in this case. None of the cases cited by the respondents in their opposition briefs involve a media controlled by a foreign dictatorship, not to mention a media with ties to a regime documented to be torturing and murdering a group of people for not giving up their belief in seeking self-improvement. For instance, in *Anyanwu v. Columbia Broadcasting System, Inc.*, 887 F. Supp. 690 (S.D.N.Y. 1995), defendant CBS is an independent information broadcaster headquartered in the United States and devotes itself to producing and broadcasting reputable programs, such as "60 Minutes," a weekly news and public affairs magazine show. CBS is not controlled by any government or regime. In *Church of Scientology International v. Time Warner, Inc.*, 806 F. Supp. 1157 (S.D.N.Y. 1992), defendant Time Warner is a private independent media and entertainment company headquartered in the United States. Its diverse programs have received numerous critical media and documentary awards globally. It also has no known government ties. Similarly, in *Provisional Government of Republic of New Afrika v. American Broadcasting Cos.*, 609 F. Supp. 104 (D.D.C. 1985). ABC is an independent radio and television network headquartered in the United States and is also not controlled by any government. In *Mikolinski v. Burt Reynolds Production Co.*, 409 N.E.2d 1324 (Mass. App. Ct. 1980), the defendant media company is a private and independent film producing company established in the United States. Likewise, it is a private company and is not controlled by any government. This is also the case with *Khalid Abdullah Tariq Al Mansour Faissal Fahd Al Talal v. Fanning*, 506 F. Supp. 186 (N.D. Cal. 1980), where none of

the media defendants, including Public Broadcasting System, are controlled by any government.[3]

The circumstances surrounding the parade of malicious false publications over the years—including, but not limited to, a regime's ongoing effort to eliminate a group by torture and killing its members (C.A. App. A-54, 143), the direct control of the respondents by the same regime seeking to completely eliminate the practitioners (C.A. App. A-402-405, 409), the compulsive repetition of the falsifications and the sheer volume of the false articles (C.A. App. A-160-162), the collaboration among the respondent newspapers (C.A. App. A-402-405, 409), the articles directed at practitioners in the New York area (Pet. pp. 5-7, C.A. App. A-160-162)—causing serious injuries to the Petitioners (Pet. Fn. 6), establish reasons to believe that the publications are targeted at the petitioners and are referring to them. Indeed, this case is unprecedented in the history of the United States and engages an issue of a historical and Constitutional magnitude. The correct guidance by this Court is, therefore, necessary to position the laws in this area for future course in the United States and the world's history.

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3. *National Nutritional Foods Ass'n v. Whelan*, 492 F. Supp. 374 (S.D.N.Y. 1980) is a non-media defendant case decided before the establishment of the "intensity of suspicion" test in New York. *Brock v. Thompson*, 948 P.2d 279 (Okla. 1997) is an *Oklahoma* case involving *general* statement about plaintiffs' lawyers, which decision cannot serve as a source of applicable law to this case. *Kentucky Fried Chicken of Bowling Green, Inc. v. Sanders*, 563 S.W.2d 8 (Ky. 1978) is a *Kentucky* case involving only *critical opinion*.

II. New York's Common Law Requires The Second Circuit To Apply The "Intensity Of Suspicion" Test When Deciding Whether A Defamation To A Group Could Be "Of And Concerning" The Individual Members

An absolute bar against finding liability for defaming members of a group is overbroad and is not and has never been the law of New York. New York only requires the defamatory matter to be referring to the plaintiffs. *Gross v. Cantor*, 270 N.Y. 93, 200 N.E. 592 (N.Y. 1936).

The rightful application of the New York common law requires the lower court to apply the "intensity of suspicion" test established in *Brady v. Ottaway Newspapers, Inc.*, 84 A.D.2d 226, 445 N.Y.S.2d 786 (2d Dept. 1981) with prudence, including examining judiciously the surrounding circumstances of the publication of the defamatory articles.

Size per se was never the focus in New York group defamation cases. "In New York there has been no articulated limit on size." *Id.* at 792. "An absolute limit on size is not justifiable. There is no compelling logic 'in allowing a greater number of wrongs to afford a lesser degree of liability' in group defamation actions." *Id.* This is especially so when the "increased size is not sufficient to dilute the harm caused to the individuals from the statement so that the resulting injury falls below the threshold of legal recognition." *Id.* at 794.

Respondents attempt to escape all culpabilities for intentionally publishing falsified information against the petitioners by attempting to have this Court focus on the headcount of Falun Gong practitioners worldwide. The use of an arbitrary numerical approach to determine whether a media defendant is liable for publishing malicious false statements is certain to lead to injustice. This unacceptable

consequence is precisely what the law of New York seeks to avoid through the "intensity of suspicion" test.

Furthermore, not being named specifically in the defamatory articles does not equate the articles as not referring to or not applicable to the petitioners. It has long been established that the defamatory articles do not need to specifically name the persons for the defamation to be referring to the persons. *Van Ingen v. Mail and Express Pub. Co.*, 156 N.Y. 376, 386, 50 N.E. 979, 981 (N.Y. 1898) (it is settle law that "where a libel does not name the plaintiff, he may give evidence of all the surrounding circumstances and other extraneous facts which will explain and point out the person to whom the allusion applies"); *Ryckman v. Delavan*, 25 Wend. 186, 202 ("if the words may by any reasonable application, import a charge against several individuals, under some general description or general name, the plaintiff has the right to go on to trial, and it is for the jury to decide, whether the charge has the personal application averred by the plaintiff"), citing *Weston v. Commercial Advertiser Ass'n*, 184 N.Y. 479, 77 N.E. 660; *International Text-Book Co. v. Leader Printing Co. (C.C.)* 189 F. 86.[4]

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4. Respondent China Press mentions that the use of the terms "evil cult" to describe Falun Gong practitioners in its numerous articles is only an opinion or "subjective expression" that is protected under the Constitution. This is misleading because the word "evil" means "morally wrong or bad" and "causing injury, ruin or pain." *Webster's II Dictionary*. "Cult" has the meaning of "a religion or religious sect generally regarded as bogus or extremist." The usage of the words "evil" and "cult" together, in and together with intentionally fact-laden articles attributing Falun Gong practitioners in the New York area to be murderers, terrorists and ones performing other crimes, denotes the most malicious attempt at injuring the reputation of the petitioners. On this account, the word "sect" itself

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III. Second Circuit's Failure To Apply The Controlling New York Common Law Raises A Serious And Compelling Issue Under The Due Process Clause Of The Constitution

The "intensity of suspicion test" established by the New York intermediate court is controlling in this case, unless it is clear that the highest state court would rule otherwise. *Six Companies of California et al. v. Joint Highway Dist. No. 13 of State of California*, 311 U.S. 180 (1940), *reh'g denied*, 311 U.S. 730 (Jan. 6. 1941). *See also West et al. v. American Telephone & Telegraph Co.*, 311 U.S. 223 (1940). This test requires the federal court facing such issue to look beyond the size of the group being defamed to decide whether the defamatory false statements are "of and concerning" the injured individuals.

Although the controlling "intensity of suspicion" test established in the *Brady* case was brought to the attention of the Second Circuit in the briefs and at the oral argument, the Second Circuit has completely failed to acknowledge the

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is also often associated with the word "cult" and leads many to express hatred, contempt and aversion against the petitioners. A writing is defamatory or "actionable without allegation of proof of special damage if it tends to expose a person to hatred, contempt or aversion, or to induce an evil or unsavory opinion of him in the minds of a substantial number of the community," and it depends, "among other factors, upon the temper of the times, the current of contemporary public opinion, with the result that words, harmless in one age, in one community, may be highly damaging to reputation to another time or in a different place." *Mecher v. Chesley*, 297 N.Y. 94, 100, 75 N.E.2d 257, 259 (N.Y. 1947). *See also Silsdorf v. Levine et al.*, 59 N.Y.2d 8, 12, 449 N.E.2d 716, 719, 462 N.Y.S.2d 822, 825 (N.Y. 1983) ("the entire publication, as well as the circumstances of its issuance, must be considered in terms of its effect upon the ordinary reader").

"intensity of suspicion" test in its decision, not to mention applying the test. In its summary order, the Second Circuit merely inserted a citation to the *Brady* case, but briefly mentioning a case name in a summary order is far from applying the controlling New York test. As of today, the "intensity of suspicion" test established in the *Brady* case remains to be the controlling law in New York on the determination of the "of and concerning" issue in the context of group defamation. Second Circuit's failure to apply the controlling state law has violated the due process protection afforded the petitioners under the United States Constitution.

The cases cited by the respondents do not support a proposition otherwise. Indeed, they further strengthen the reasoning that the Second Circuit is required to apply the controlling state law and test established by the *Brady* court. *Huddleston v. Dwyer*, 322 U.S. 232, 236 (1944) ("where state law controls, federal appellate courts as well as trial courts must ascertain and apply the state law"); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985) (involving interpretation of state statute); *Butner v. United States*, 440 U.S. 48 (1979) (state law applies in security interest question); *Cort v. Ash*, 422 U.S. 66, 76 (1975) (the duty is to decide the case "according to the law existing at the time of the decision"); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 532 (1949), ("rights enjoyed under local law should not vary because enforcement of those rights was sought in federal court rather than in the state court"), *reh'g denied*, 338 U.S. 839. *See also Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) (in diversity cases, the rights enjoyed under state law should not be different only because the enforcement of those rights was sought in a federal court instead of the state court).

Respondents' citing of the case, *Paul v. Davis*, 424 U.S. 693 (1976), to support their contention that "there is no

constitutional basis for providing a libel claim" is entirely out of context. *Paul v. Davis* is *not* a defamation claim, but a claim based on the deprivation of "liberty" or "property" rights under the Constitution. The Court in that case acknowledged that if the same underlying claim was brought in a state court, it would have been an actionable defamation claim. *Id.* at 697. This is very different with what is at issue in our case. What we have here is Second Circuits' non-application of the controlling state law, from which lies the petitioners' claim for Second Circuit's violation of the Due Process Clause.

Respondent newspapers cannot deny that they are directly responsible for the hostile climate created in the New York area against the Petitioners, an effect clearly intended by the respondents; a few headlines they have been using are illustrative of such heinous intentions. Petition pp. 5-7. Worse yet, the harm done are beyond the damages suffered by the petitioners, for what has been created is an atmosphere where intentional falsities are allowed to spread continuously and thrive.[5] The consequences of these defamatory articles are far-reaching. Many of these reports written in New York are imported back into Communist China to legitimize and increase the torture and killing of Falun Gong practitioners there. The lives and well-being claimed by such publications will not fade into insignificance. By claiming protection from

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5. For more than five years, the petitioners have been enduring the severe pressure in the hostile communities they work and live in. Petitioners continuously resist through all peaceful means, urging the international communities to help stop the torture and killing of practitioners still continuing in Communist China. However, each member of the larger community also needs to be held responsible to varying degrees for the creation of such environment, without their silence which poisonous spread would not have been possible.

the Constitution and laws of the United States but not heeding to the basic journalism ethical standards applicable to all responsible press here, the respondents are attempting to make a mockery of the legal system in the United States.

CONCLUSION

For all the foregoing reasons and the reasons stated in the Petition for a Writ of Certiorari filed earlier with this Court, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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